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Supreme Court, U.S.
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No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CORONATION SHIPPING COMPANY

and

THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED,
Petitioners

v.

GLENN J. CREPPEL, JR.,
Respondent

Petition for a Writ of Certiorari to the Court of Appeal, Fifth Circuit, State of Louisiana

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state appellate court violates the constitutional supremacy and uniformity of federal maritime law in imposing duties and standards of care stricter than those established by the maritime jurisprudence?

2. Does the constitutional supremacy and uniformity of federal maritime law require a state court reviewing a maritime case to apply uniform federal principles of review rather than inconsistent state review principles that allow the state appellate court to reevaluate conflicting evidence and substitute its fact findings for those of the trial court?

3. Whether a state appellate court, reviewing a jury verdict and judgment in a federal maritime case filed in state court under the "saving to suitors" clause of 28 U.S.C. § 1333, violates the constitutionally-mandated supremacy and uniformity of federal maritime law in applying a state standard of appellate review to (a) reverse a jury verdict and court judgment, (b) reweigh the evidence and redecide the facts, and (c) enter a contrary judgment, even though the jury's verdict was supported by substantial evidence?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceeding below were petitioners, Coronation Shipping Company (the owner of the ocean-going cargo vessel, M/V SEABRAVERY) and The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited (the vessel owner's protection and indemnity insurer), and respondent, Glenn J. Creppel, Jr. (plaintiff).

Additional parties below that are not before this Court are Commercial Union Insurance Company (the workers' compensation insurer of Mr. Creppel's employer who intervened in the lawsuit), Thenamaris Ship Management, Inc. (an agent for the M/T SEABRAVERY), and Mr. J.T. Doyle (the river pilot aboard the M/T SEABRAVERY at the time of the accident, who was named as a defendant). Thenamaris was dismissed from the case at the trial court by consent of the parties. Commercial Union did not appeal the jury verdict and trial court judgments and did not appear on appeal. See Appendix 1a-2a, *infra*. Pilot Doyle was dismissed from the case at trial, and no party appealed his dismissal.*

Petitioner, Coronation Shipping Company, certifies pursuant to this Court's Rule 29.1 that it has no parent companies or subsidiaries within the scope of the rule.

Petitioner, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, certifies pursuant to this Court's Rule 29.1 that it has no parent companies or subsidiaries within the scope of the rule.

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* Counsel for Commercial Union and for Mr. Doyle have been served with copies of this petition, as have counsel for respondent Creppel. Thenamaris was represented by undersigned counsel.

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Petition for a Writ of Certiorari to the Court of Appeal, Fifth Circuit, State of Louisiana

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Coronation Shipping Company and The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal, Fifth Circuit, State of Louisiana, entered in the above-entitled proceeding on December 12, 1990.

OPINIONS BELOW

The opinion of the Court of Appeal, Fifth Circuit, State of Louisiana, entered on December 12, 1990, is reported at 572 So.2d 1051-58 and is reprinted in the appendix hereto, p. 1a, *infra.*

The order of the Supreme Court of Louisiana denying petitioners' request for a writ of certiorari or review, entered on February 22, 1991, is reported at 575 So.2d 390 and is reprinted in the appendix hereto, p. 15a, *infra.*

The jury verdict, judgment, and order denying respondent's post-trial motion for new trial or judgment notwithstanding the verdict, entered in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, are unpublished and are reprinted in the appendix hereto, pp. 16a-21a, *infra.*

JURISDICTION

Respondent, Glenn J. Creppel, Jr., asserting his right to file his maritime personal injury claim in state court under the "saving to suitors" clause of 28 U.S.C. § 1333, filed suit in the 24th Judicial District Court, Parish of Jefferson, State of Louisiana. Respondent's claim subsequently was tried to a jury which, on October 4, 1989, rendered a verdict for petitioners exonerating them of all negligence. Appendix 16a, *infra.* On October 5, 1989, the trial court rendered judgment on the jury's verdict. Appendix 20a, *infra.* Respondent subsequently timely filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The trial court entered judgment denying these motions on January 16, 1990. Appendix 23a, *infra.*

Respondent then timely appealed to the Court of Appeal, Fifth Circuit, State of Louisiana. The Court of Appeal entered its decision on December 12, 1990. 572 So.2d 1051; Appendix 1a, *infra.* Applying Louisiana principles of appellate review, the Court of Appeal reversed the jury verdict and trial judgment in favor of petitioners, substituted its own version of the facts for the verdict of the jury, and rendered judgment holding petitioners liable for respondent's injuries. *Id.* The Court

of Appeal remanded to the trial court to retry the quantum of respondent's damages.[1] *Id.*

On January 11, 1991, within the thirty days allowed by Louisiana Supreme Court Rule X, § 4(b),[2] petitioners filed an application for a writ of certiorari, or review, with the Supreme Court of Louisiana. The Supreme Court of Louisiana denied petitioners' application on February 22, 1991. 575 So.2d 390; Appendix 15a, *infra.*

Petitioners now invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a), by filing this petition within the 90-day time period provided by 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. I, § 8, cl. 3 provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .

U.S. Const. art. III, § 2, cl. 1 provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or

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[1] Under Louisiana law, the liability judgment of the Court of Appeal is final and subject to no further appellate review. La. Code Civ. P. art. 1841 provides in pertinent part: "A judgment that determines the merits in whole or in part is a final judgment." La. Code Civ. P. art. 2166(D) further provides, in pertinent part: "If the application for certiorari to the [Louisiana] supreme court is timely filed, a judgment of the court of appeal becomes final and definitive when the [Louisiana] supreme court denies the application for certiorari."

[2] La. Sup. Ct. R. X, § 4(b) provides in pertinent part: "The application [for writ of certiorari, or review] shall be made within thirty days of the mailing of the notice of the original judgment of the court of appeal . . ."

> which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime jurisdictions; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. VI, cl. 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. § 1333 provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

La. Const. (1974), Art. V, § 5(C) provides in pertinent part:

> (C) Scope of Review. Except as otherwise provided by this constitution, the jurisdiction of the supreme court in civil cases extends to both facts and law.

La. Const. (1974), Art. V, § 10(B) provides in pertinent part:

(B) Scope of Review. Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts.

STATEMENT OF THE CASE

A. Preface

In recent years, increasing numbers of federal maritime cases have been filed in state courts. Plaintiffs' attorneys often file their clients' actions in state courts to avoid the application of federal doctrines and standards that they perceive as unfavorable. *See, e.g.*, Robertson and Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Anti-Suit Injunctions*, 68 Tex.L.Rev. 937, 940 (1990) (noting the increasing transnational personal injury litigation being brought in the state courts and that "knowledgeable plaintiffs' lawyers are looking to state courts to vindicate their transnational clients' rights"); Duplantier, *Louisiana: A Forum, Conveniens Vel Non*, 48 La.L.Rev. 761, 786-87 (1988) (noting that Louisiana is a "welcome center" for maritime and transnational litigation); Due, *The Status of Admiralty Forum Non Conveniens in State Court Personal Injury and Wrongful Death Litigation*, 2 Mar.L.Rev. 7, 7, 11 (1987) (noting that plaintiffs are filing their maritime claims in state court to avoid the maritime *forum non conveniens* doctrine and federal Anti-Injunction Act problems).

In Louisiana state court, where large numbers of these cases are being filed, state practices are often applied that materially affect the substantive rights of the parties. Despite being admonished by the federal courts (*see Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176 (5th Cir. 1990)), the Louisiana Supreme Court has insisted that Louisiana is not bound by maritime doctrines that affect substantive rights, such as the maritime doctrine of

forum non conveniens (*see Markzannes v. Bermuda Star Line, Inc.*, 545 So.2d 537 (La. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 837, 107 L.Ed.2d 832 (1990)) and federal principles of appellate review (*see Daigle v. Coastal Marine, Inc.*, 488 So.2d 679 (La. 1986)).

In this case, a Louisiana appellate court ignored a well-established maritime standard of care and employed state principles of appellate review to reverse a jury verdict that comported with the evidence and maritime law and that clearly could not have been reversed under established federal standards.

As discussed below, federal maritime law is the supreme law of the land that must be uniformly applied by both state and federal courts adjudicating maritime claims. Maritime law preempts state law, and the state courts are not free to alter the rights of maritime litigants. Parties bringing maritime claims should not be allowed to circumvent established maritime law by filing their claims in state court.[3] The decision below implicates important questions regarding the supremacy and uniformity of federal maritime law. The increasing number of admiralty and maritime cases being filed in the state courts and the resulting implications on international maritime commerce render these questions of significance far beyond the context of this litigation. Petitioners submit that this Court should grant a writ to consider these important questions.

B. The Underlying Facts

On October 20, 1987, the M/T SEABRAVERY, a Maltese-flagged, oceangoing tanker vessel purchased by

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[3] Due, *supra*, brazenly notes, "If the state court system refuses to accept such pre-emption and uniformity arguments . . . it is questionable whether the defendants will be able to get the United States Supreme Court to grant certiorari." *Id.*, 2 Mar.L.Rev. at 11. He concludes, "State court . . . still remains the possible only safe haven for certain foreign maritime personal injury and wrongful death claims."

petitioner Coronation shortly before the incident in question, suddenly and unexpectedly lost its steering while proceeding down the Mississippi River near New Orleans.[4] The vessel's unanticipated steering loss resulted when a concealed, internal fitting on a steering system hydraulic line separated internally. The resulting loss of hydraulic pressure rendered the vessel's steering inoperative.

At the time, respondent Creppel was employed cleaning barges moored near the river bank. Creppel, believing that the vessel would collide with the barges where he was working, injured himself when he jumped down to the deck of another barge. The M/T SEABRAVERY subsequently collided with a downriver barge fleet, not with the fleet where plaintiff was working.

C. An Overview of the Vessel's Steering System and the Cause of the Steering Failure

The M/T SEABRAVERY, like most other oceangoing vessels, is equipped with an electrohydraulic steering system. That is, electric signals sent by the steering wheel on the vessel's bridge activate hydraulic valves. The valves, in turn, direct hydraulic fluid under pressure to move the ship's rudder. Three gauges are connected to the pressure lines to monitor the steering system's pressure. Any major breach of this pressurized hydraulic system, such as a broken line, results in a loss of steering pressure to the rudder, and consequently the loss of the vessel's steering. The M/T SEABRAVERY lost its steering when the tubing connecting a pressure gauge unexpectedly pulled free from its internal fitting.

D. The Conflicting Evidence on the Question of Negligence

Respondent argued to the jury and to the state appellate courts that petitioners were negligent in the following

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[4] Petitioner, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, was the protection and indemnity ("P&I") insurer of the M/T SEABRAVERY.

respects: (1) in allowing copper tubing, rather than stainless steel tubing, to connect the pressure gauges to the steering hydraulic lines; (2) in failing to completely disassemble and inspect the internal fitting that failed; (3) in keeping open a pressure gauge "isolation valve" while the vessel was navigating in the Mississippi River; and (4) in operating a vessel with inadequate and inadequately installed alarms on the steering system. The jury heard substantial conflicting evidence on respondent's claims and concluded that petitioners were not negligent.

1. *The Copper Tubing*

The vessel's steering gear, as originally built, contained stainless steel hydraulic lines. However, sometime before the vessel was sold to Coronation, the pressure gauges were connected to the hydraulic lines using copper tubing and a copper fitting.

Respondent's expert, Mr. Cole, testified that the vessel's steering gear manual "required" the use of stainless steel tubing, rather than copper tubing, to connect the gauges to the hydraulic lines. He opined that the use of copper rendered the vessel negligent. However, substantial testimony and physical evidence, including the steering gear manual, contravened this testimony.

The steering gear manual (pertinent portions quoted in the Court of Appeal's decision, *see* Appendix at 11a-12a, *infra*) did not prohibit the use of copper tubing to connect the pressure gauge. It merely indicated that stainless steel tubing was used when the ship was built. It contained no prohibition against using copper tubing or fittings when making repairs.

Petitioner's expert, Mr. Haveman, testified that using copper tubing was acceptable. He testified that the M/T SEABRAVERY was entered in the Lloyd's Register of Shipping, an international, non-profit, maritime organization that sets the rules and standards for ship repair and construction and that inspects and classifies vessels for

nations worldwide. Haveman testified that Lloyd's rules authorize *either copper or steel*; he knew of nothing that prohibited the use of copper for the connection in question. Haveman further stated that the ship's manual did not require that repairs be made with steel. He testified that the Lloyd's surveyor had inspected the vessel on August 1, 1987, and issued the vessel certificates approving its condition, including the copper tubing.

Two engineering officers that had served aboard the M/T SEABRAVERY, a former Chief Engineer and the Second Engineer at the time of the casualty, also testified that copper was an appropriate repair material. Both testified that they had seen copper tubing used on other vessels.

2. *Inspection of the Fitting*

Respondent contended, and his expert testified, that the vessel was negligent in not completely disassembling and inspecting the internal fitting that failed before the accident. However, substantial evidence rebutted this testimony. Expert Haveman and the Chief Engineer both testified that unless a hydraulic fitting is leaking, or there is some visible sign of something wrong, disassembly of connections for purpose of inspections is unwise and is not required. The Chief Engineer and the Second Engineer testified that the steering system, including the connections, is inspected frequently—as often as hourly when the system is in use—and that no signs of leakage were observed before the casualty. The steering system was inspected and tested shortly before the casualty and all was in order. Expert Haveman testified that he had examined the lines after the casualty and found nothing that indicated the lines would fail. Furthermore, because copper was an acceptable repair material and did not violate any safety standards, the mere existence of the copper tubing gave rise to no extraordinary duty of inspection by disassembly.

3. *The Isolation Valve*

The hydraulic tubing leading to each pressure gauge contained an "isolation valve" to activate and deactivate the gauges. When a gauge's valve is closed, no fluid flows through the line to the gauge and the gauge is inoperable. When a gauge's valve is open, fluid would flow to the gauge. If the valve for the gauge in question had been closed, no fluid would have flowed through the fitting that failed, and the casualty would not have occurred. Thus, respondent contended, and his expert testified, that leaving the valve open was negligent, and that the valve should be closed, except when the crew was taking pressure readings. Respondent pointed to a recommendation in the steering gear manual that the valve be kept closed except when readings were being taken. Again, substantial testimony and evidence rebutted the testimony of respondent's expert.

The Chief Engineer, the Second Engineer, and Expert Haveman all testified that prudent seamanship practices require that the valve be kept open while the vessel is navigating in confined waters, such as the Mississippi River. They explained that when the vessel is maneuvering on a river, and the rudder is being maneuvered often, the gauges must be kept open so that the crew can quickly observe the steering pressure and the working of the equipment. They further testified, consistent with the plain language of the steering gear manual, that the purpose for the manual's recommendation to keep the valve closed was to protect the accuracy of the gauges, not to protect against a steering failure. Expert Haveman testified that he knew of no rule or regulation that required the isolation valve to be closed. The Coast Guard found no negligence on the part of the vessel in keeping the valve open. An endorsement on the Coast Guard report confirmed that the purpose of the manual's recommendation to keep the valve closed was to protect the gauges, not to prevent a steering failure.

4. *The Alleged Inadequate Alarms*

Respondent, supported by the testimony of his expert, alleged that the steering alarms on the vessel were useless and in violation of applicable regulations. However, substantial evidence demonstrated that the vessel's alarms complied with and sounded as required by all applicable international maritime regulations. International regulations required the vessel to have a low fluid level alarm on the bridge and in the engine room; the M/T SEA-BRAVERY had these alarms. In addition to the low fluid level alarm, the vessel was equipped with a steering pressure alarm that sounded when the hydraulic system lost pressure.

Furthermore, substantial evidence demonstrated that the ship's alarms functioned properly. While the vessel's river pilot could not recall hearing any alarm sounding on the bridge, other witnesses testified that the alarms worked as designed. The Second Engineer testified that the low pressure alarm sounded about one minute before impact, *i.e.*, at the time the vessel lost its steering.[5] The low fluid level alarm sounded about the time of the impact, *i.e.*, about one minute later when sufficient fluid had drained from the fluid reservoir to trigger the alarm.[6] The Second Engineer further testified that the low fluid level alarm was still sounding when he went to the bridge immediately after impact. The Chief Engineer testified that the Lloyd's inspector tested the low fluid level alarm

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[5] The vessel's river pilot testified that he realized that the vessel lost its steering about one minute before impact.

[6] Unlike the low *pressure* alarm, which is designed to sound immediately upon a loss of steering pressure, the low *fluid level* alarm is not designed to sound, and is not required by international marine regulations to sound, until the fluid level in the system's reservoir is low. Thus, where a breach in the system causes a loss of pressure in the steering hydraulic system, as happened here, the pressure alarm will sound first. Subsequently, when the breach in the hydraulic system causes sufficient fluid to drain from the fluid tank, the low fluid level alarm is triggered.

shortly before the collision and found that it worked as designed.

Finally, substantial evidence demonstrated that the alarms, whether they sounded or not, could not have prevented the casualty. The vessel's river pilot testified that he knew of the steering failure about one minute before impact—about the same time that the Second Engineer heard the low pressure alarm sound. Thus, whether or not the alarm sounded, the pilot was aware of the steering failure immediately. Furthermore, the ship's river pilot also testified that once a large vessel, such as the M/T SEABRAVERY, loses its steering in a confined waterway such as the Mississippi River, a collision is imminent and virtually unavoidable because of the substantial time needed to counter the vessel's momentum that resulted from the steering loss.

E. The Jury Evaluates the Evidence and the State Appellate Courts Reverse

On October 4, 1989, after trying the case for over a week, the jury exonerated petitioners of all negligence. Appendix, 16a-19a, *infra*. The trial court entered judgment in accordance with the jury verdict. Appendix, 20a, *infra*. The trial court also denied respondent's motions for a judgment notwithstanding the verdict, or alternatively, for a new trial. Appendix, 23a, *infra*.

On December 12, 1990, the Court of Appeal, Fifth Circuit, State of Louisiana, applying Louisiana principles of appellate review, reversed the jury's verdict. The court spent seven of its fourteen legal page decision discussing the conflicting trial testimony and evidence. 572 So.2d 1051; Appendix, 5a-12a, *infra*. While the appellate court *conceded* that the evidence regarding the vessel's negligence conflicted, it concluded that the jury's verdict was not supported by the evidence. The Court of Appeal then reweighted the evidence and entered judgment for respondents. Appendix, 13a-14a, *infra*. Although no

one challenged the trial court's jury instructions regarding the maritime standard of care,[7] the Court of Appeal *sua sponte* substituted a stricter standard of care. Appendix, 13a-14a, *infra*.

Petitioners then sought review before the Supreme Court of Louisiana challenging, *inter alia*, the authority of the Court of Appeal to redefine the established maritime standard of care and to review the case under state, rather than federal, principles of review. On February 22, 1991, the Supreme Court of Louisiana denied petitioners' application for review, with one judge dissenting and one judge abstaining. 575 So.2d 390; Appendix, 15a, *infra*.

REASONS FOR GRANTING THE WRIT

I. THE LOUISIANA COURT OF APPEAL VIOLATED THE CONSTITUTIONAL UNIFORMITY DOCTRINE AND THE CONSTITUTIONAL SUPREMACY OF FEDERAL MARITIME LAW BY ALTERING THE ESTABLISHED MARITIME NEGLIGENCE STANDARD OF CARE

This Court continually has held that federal admiralty and maritime law is constitutionally supreme and must be applied uniformly by all courts—state and federal—adjudicating maritime claims. *E.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223 (1986); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-11 (1953); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244-46 (1942); *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 386 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 157-60 (1920). "While states may sometimes supplement federal maritime policies, a

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[7] As required by this Court's decision in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), the trial court correctly charged the jury that petitioners' duty was one of "reasonable care under the circumstances."

state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court." *Hawn*, 346 U.S. at 409-410. The substantial rights of the parties must not depend "on which courthouse, or even on which 'side' of the same courthouse, a lawyer might guess to be in the best interests of his client." *Id.*, at 411.

In *Kermarec*, *supra*, this Court established that the standard of care that a maritime defendant owes to a maritime plaintiff is a matter of substantive maritime law. *Id.*, 358 U.S. at 628. The Court held that maritime law, not New York law, governed the standard of care owed by a maritime defendant. *Id.* There, the trial court granted a motion for judgment notwithstanding the verdict, overturning a jury verdict on the grounds that the verdict was not supportable under the law of New York. *Id.*, at 627-28. The court of appeals affirmed. *Id.*, at 628. This Court reversed and ordered that the jury verdict be reinstated because maritime law—not New York law—applied to the case, and because the jury's verdict was sustainable under the maritime law. *Id.*, at 628-32. This Court held that the standard of care owed to non-crewmembers was one of reasonable care under the circumstances. *Id.*, at 630. *See also Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449 (1925) (holding that federal maritime law preempted state law regarding the rights and liabilities of the parties in a maritime tort action).

The Louisiana Court of Appeal in this case, like the courts in *Kermarec*, impermissibly altered this established standard of care. The trial court, following *Kermarec*, correctly charged the jury that the standard of care owed by a vessel owner is one of "reasonable care under the circumstances." Respondent made no trial objection or appellate argument regarding this charge, and the jury exonerated petitioners under this established maritime standard of care. Nonetheless, the Court of Appeal, *citing*

no maritime law, essentially held petitioners strictly liable for purportedly failing to operate a safe ship. The Court of Appeal, ignoring *Kermarec* and citing no authority whatever, concocted a vague and undefined "duty to operate a safe vessel" as its basis for reevaluating the evidence and holding petitioners absolutely liable. Appendix, 13a-14a, *infra*. The Court of Appeal violated its constitutional obligation, imposed by the uniformity doctrine and the supremacy of federal maritime law, to apply—and not to alter—established federal maritime law.

The Court of Appeal's refusal to apply established maritime law has international implications far beyond this case. As the U.S. Fifth Circuit recently recognized in discussing *Asahi Metal Industry Co. v. Superior Court of California, Solano City*, 480 U.S. 102, 114-16 (1987), "[f]ederal foreign policy interests do not disappear when purely private foreign parties come before U.S. courts." *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 321 (5th Cir. 1987), *reversed in part on other grounds*, 486 U.S. 140 (1988). The fact that maritime commerce, by definition, is international, dictates the need for a uniform federal maritime law by which all courts, state and federal, are bound. Although addressing jurisdiction and choice of law, the following comment from *Lauritzen v. Larsen*, 345 U.S. 571, 581 (1953), stresses the need for uniformity in the federal maritime law:

> [T]he virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea.

The opinion of the Court of Appeal destroys that uniformity. Published and indexed in the national reporter system, it stands for the proposition that *Kermarec* and

the federal maritime law need not be followed. Under the Court of Appeal's decision, the states are free to ignore the maritime duties established by this Court and to impose arbitrary duties on a case-by-case basis.

Furthermore, the decision of the Court of Appeal subordinated uniform standards of care established by international maritime regulations and customs to those that it established. The court below essentially found that international safety regulations, equipment requirements, and customs were overridden by the state court's vague, self-imposed, strict "duty to operate a safe vessel." Appendix, 13a-14a, *infra*. The Court of Appeal's decision, if allowed to stand, will authorize courts adjudicating maritime cases to freely violate these established, international precepts by which the international maritime community is bound. Rather than being bound by a supreme, uniform maritime law, international commerce will be subject to a myriad of local regulations and duties, each establishing a separate standard of care.

Petitioners submit that the decision of the Court of Appeal seriously undermines the supremacy and uniformity of federal maritime law by supplanting established federal standards of care with arbitrarily imposed state standards. Petitioners submit that this Court should issue a writ to consider this important issue.

II. THE LOUISIANA COURT OF APPEAL VIOLATED THE CONSTITUTIONAL UNIFORMITY DOCTRINE AND THE CONSTITUTIONAL SUPREMACY OF FEDERAL MARITIME LAW BY UTILIZING STATE PRINCIPLES OF APPELLATE REVIEW

The constitutionally required uniformity of federal maritime law not only requires state courts hearing maritime cases to apply substantive maritime law, but also other rules that materially affect substantive maritime rights. Maritime tort actions are "a type of action

which the Constitution had placed under national power to control in 'its substantive *as well as its procedural* features.'" *Hawn*, 346 U.S. at 409, *quoting Johnson*, 264 U.S. at 386 (emphasis supplied).

This Court has refused to allow the state courts to apply state procedures that interfere with the substantive rights of maritime litigants. In *Hawn*, the Court held that the Pennsylvania procedural contributory negligence rule could not be applied in a maritime personal injury action. *Id.*, 346 U.S. at 408-412. "[T]he substantial rights of the parties [should not] depend on which courthouse, or even on which 'side' of the same courthouse, a lawyer might guess to be in the best interests of his client." *Id.*, 346 U.S. at 411.

Similarly, in *Garrett*, the Court held that federal maritime principles, and not Pennsylvania procedure, provided a seaman's burden of proof in determining the validity of a release that the seaman had signed. *Id.*, 317 U.S. at 243-46. This Court stressed that the state court must employ procedures that protect the substantive rights of the parties under the controlling federal maritime law. *Id.*

In furtherance of these fundamental principles announced in *Hawn* and *Garrett*, other courts have held that other so-called "procedural" concepts that materially affect the substantive rights of maritime litigants form an integral part of the maritime law that must be applied in maritime cases by both state and federal courts. *Butler v. American Trawler Co., Inc.*, 887 F.2d 20, 21 (1st Cir. 1989) (holding that a maritime statute of limitations preempted a state statute of limitations); *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 207 (1st. Cir. 1988) (holding that maritime comparative negligence principles preempted Massachusetts comparative negligence principles); *Chick Kam Choo*, *supra*, 817 F.2d at 316-25 (holding that the uniformity doctrine and the supremacy of federal maritime law require state courts

to apply the maritime doctrine of *forum non conveniens*); *Ikospentakis, supra*, 915 F.2d 176 (5th Cir. 1990) (finding that Louisiana's refusal to apply the maritime doctrine of *forum non conveniens* violates the supremacy and uniformity of federal maritime law); *Intagliata v. Shipowners & Merchants Towboat Co., Ltd.*, 26 Cal.2d 365, 159 P.2d 1 (1945) (holding that the former maritime division of damages rule preempted state law); *Fort v. Lewis*, 649 S.W.2d 204 (Ky. Ct. App. 1983) (finding that "both substantive and procedural features of maritime law control" in a maritime action filed in state court); *Celeste v. Prudential-Grace Lines, Inc.*, 35 N.Y.2d 60, 358 N.Y.S.2d 729, 315 N.E.2d 782 (N.Y. Ct. App. 1974) (holding that the federal maritime doctrine of laches preempted the state statute of limitations.)

This case demonstrates the disparity of result and the lack of uniformity that ensue when state courts apply their own principles of appellate review to a maritime case. Findings of fact in maritime cases tried by the court without a jury are subject to review under the "clearly erroneous" rule. *McAllister v. United States*, 348 U.S. 19, 20 (1954). Where a maritime case is tried to a jury, reviewing courts apply an even stricter standard. *E.g., Rios v. Empresas Lineas Maritimas Argentinas*, 575 F.2d 986, 990 (1st Cir. 1978) (the jury should be overruled, and a judgment n.o.v. should be granted only when no conclusion but one could be drawn from the evidence); *Treadaway v. Societe Anonyme Louis-Dreyfus*, 894 F.2d 161, 164 (5th Cir. 1990) (grant of a judgment n.o.v. and reversal of a jury verdict is inappropriate "unless consideration of all of the evidence and inferences favorable to the nonmoving party convinces the Court that no reasonable jury could arrive at a contrary verdict."); *Scheib v. Williams-McWilliams Co., Inc.*, 628 F.2d 509, 512 (5th Cir. 1980) (where no directed verdict is made at the close of evidence, the jury's verdict cannot be reversed, absent "plain error,"

where there was *any* evidence, regardless of its sufficiency, supporting the verdict).

Thus, under the standards normally applied to maritime cases, whether under the "clearly erroneous" rule or under the stricter jury review standards, the verdict of a jury supported by substantial evidence cannot be reversed. Where the evidence conflicts and the trier of fact could decide the case for either party, the appellate court is not free to substitute its own findings for those of the trial court. *McAllister, supra.* Furthermore, even where there is an error requiring a reversal, the appellate court is not free to reweigh the evidence and enter judgment; it must remand the case to the trial court for a new trial. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982); *Berg v. Chevron U.S.A., Inc.*, 759 F.2d 1425, 1431 (9th Cir. 1985); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1323 (11th Cir. 1989); *Hayes-Leger Associates, Inc. v. M/V ORIENTAL KNIGHT*, 765 F.2d 1076, 1081 and n.10 (11th Cir. 1985).

The Louisiana principles of review applied in this case differ substantially and materially. Several Louisiana intermediate appellate courts had held that the federal "clearly erroneous" rule, and not state principles of review, should be applied to Jones Act maritime cases filed in state court. *E.g., Robertson v. Geophysical Service, Inc.*, 469 So.2d 22, 24 (La. App. 1st Cir. 1985); *Rivers v. Schlumberger Well Surveying Corp.*, 389 So.2d 807, 810-11 (La. App. 3d Cir. 1980); *Ferdinandtsen v. Delta Marine Drilling Co.*, 235 So.2d 641, 644-45 (La. App. 4th Cir. 1970); *Sutton v. Central Gulf Lines, Inc.*, 433 So.2d 888, 891 (La. App. 5th Cir. 1983). However, in 1986, the Louisiana Supreme Court, in *Daigle v. Coastal Marine, Inc.*, 488 So.2d 679 (La. 1986), refused to apply federal standards of review to a maritime personal injury claim brought in state court by a boat passenger who had injured himself on a vessel stairway. The Louisiana Supreme Court, contrary to the previous

rulings by the state intermediate courts of appeal, held that "the procedural law of Louisiana controls as to the scope of appellate review." *Daigle*, 488 So.2d at 682.[8]

Under the Louisiana law applied in *Daigle* and in this case, the appellate courts have the authority to review the law *and the facts*. La. Const. 1974, Art. V, §§ 5, 10; *Daigle*, 488 So.2d at 682; *Gonzales v. Xerox Corp.*, 320 So.2d 163, 165 and n.1 (La. 1975). The Louisiana appellate courts are required to reweigh the evidence and redecide the case where the appellate court finds a basis, legal or factual, for undermining the jury verdict or trial court judgment. *Daigle, supra; Gonzales, supra.* In theory, the jury verdict or trial court fact findings are entitled to substantial deference and should not be reversed absent "manifest error." *Rosell v. Esco*, 549 So.2d 840, 844 (La. 1989). However, in practice, as the Court of Appeal's decision in this case demonstrates, a Louisiana appellate court that disagrees with the judgment below is free to reweigh the evidence on appeal by simply finding a legal error, or by simply disagreeing with the trial court's resolution of the facts.[9]

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[8] *Daigle*, a case involving a personal injury of a passenger on a vessel in navigation, clearly involved a maritime claim subject to federal maritime substantive law. *See Kermarec, supra.* Nonetheless, the Supreme Court of Louisiana, in addition to holding that state principles of review applied to that case, also held that Louisiana substantive law governed. *Daigle*, 488 So.2d at 682.

[9] Respondent will no doubt argue, as he argued to the Louisiana Supreme Court, that petitioners waived this argument by consenting to a state standard of review before the Court of Appeal. Respondent's contention is specious. The Louisiana Supreme Court had ruled in *Daigle, supra*, that state principles of appellate review, and not federal principles, applied in a maritime case. The Court of Appeal was bound by *Daigle* and was powerless to apply any standard of appellate review except the state standard. As only the Louisiana Supreme Court could reverse *Daigle*, petitioners correctly raised this issue in their writ application to that Court.

Furthermore, the issue below, *raised by respondent* as appellant before the Court of Appeal, was sufficiency of the evidence. Petitioners, as appellees below, were arguing for preservation of the

In *Hawn*, this Court held that the substantive rights of maritime litigants should not depend on where a lawsuit is filed. 346 U.S. at 411. The uniformity doctrine and the constitutional supremacy of the maritime law require that the party's rights be the same, regardless of the forum. *Id.; Garrett, supra.* The application of Louisiana principles of review to this maritime case vividly demonstrates the lack of uniformity and the substantial impact on maritime substantive rights that result when state principles of review are applied to a maritime case.

The conflicting evidence in this case is discussed above, as well as in the decision of the Court of Appeal. *See* Appendix, 5a-12a, *infra.* Had this case been reviewed under principles of appellate review, whether under the "clearly erroneous" rule or under the stricter jury verdict review standards, the substantial conflicting evidence would have mandated that the jury's verdict be affirmed.

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jury's verdict and had no obligation to preserve any error until the Court of Appeal applied the wrong standard and reversed the jury verdict. Petitioners timely challenged the Court of Appeal's error at the earliest opportunity—in its writ application to the Louisiana Supreme Court.

Finally, the courts have an independent obligation to apply the legally correct standard of review. *See Fox v. Commissioner of Internal Revenue*, 718 F.2d 251, 253 (7th Cir. 1983) (addressing the question of standard of review where the parties did not address the issue); *Shakman v. Democratic Organization of Cook County*, 722 F.2d 1307, 1309 (7th Cir. 1983) (applying the correct standard where one party argued an erroneous standard and the other party failed to discuss the issue); *American International Underwriters (Philippines), Inc. v. The Continental Ins. Co.*, 843 F.2d 1253, 1256 (9th Cir. 1988) (applying the correct standard of review where one of the parties argued an erroneous standard). This Court on several occasions, has applied the correct standard where the court below applied an improper standard. *See Amadeo v. Zant*, 486 U.S. 214, 223 (1988); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 n.1 (1988); *Anderson v. Bessemer City*, 470 U.S. 564, 566 (1985); *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 618-19 (1966).

However, under state principles of review, the appellate court was free to reweigh the evidence, refind the facts *de novo*, and enter a judgment contrary to the jury verdict. The Louisiana Court of Appeal spent seven legal pages—*approximately half the text of its decision*—describing the conflicting evidence on the question of petitioners' asserted negligence. Appendix, 5a-12a. It then *admitted* that the evidence conflicted, *id.* 12a, before disagreeing with the jury's verdict, retrying the case on appeal, and entering judgment for respondent.

This case demonstrates that applying state principles of appellate review materially alters the substantive rights of the parties and destroys the uniformity of decision in the maritime law that the Constitution requires. Petitioners submit that this Court should grant a writ to consider whether the supremacy of federal maritime law and the uniformity doctrine require that all maritime cases be reviewed under uniform federal principles of review.

CONCLUSION

This case involves important questions of international concern regarding the constitutionally required supremacy and uniformity of federal maritime law. For the reasons set forth above, petitioners submit that the Court should grant a writ of certiorari.

Respectfully submitted,

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May 17, 1991

APPENDICES

APPENDICES

APPENDIX A

COURT OF APPEAL
FIFTH CIRCUIT
STATE OF LOUISIANA

No. 90-CA-425

GLENN J. CREPPEL, JR.

versus

CORONATION SHIPPING CO.,
THENAMARIS MANAGEMENT, INC.
and TERRANCE DOYLE

Appeal from the Twenty-Fourth Judicial District Court
for the Parish of Jefferson, State of Louisiana,
Division "C", No. 359-213,
Honorable Joseph F. Grefer, Judge

LAWRENCE A. CHEHARDY
Chief Judge

[Dec. 12, 1990]

(Court composed of Judges Lawrence A. Chehardy, H. Charles Gaudin, and Charles Grisbaum, Jr.)

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REVERSED AND REMANDED

Plaintiff, Glenn J. Creppel, Jr., appeals a judgment dismissing his personal injury suit against defendants Coronation Shipping Company, Ltd. (Coronation), and its insurer, United Kingdom Steam Ship Assurance Association (Bermuda), Ltd. (United Kingdom). The case arose from a ship collision on the Mississippi River near Harahan, Louisiana.

On appeal, plaintiff first contends the trial judge erred in failing to instruct the jury on the maritime presumption of negligence, which is applied to collisions involving drifting vessels. Plaintiff also asserts the jury was clearly wrong in failing to find defendant Coronation negligent. We agree with the latter contention and reverse the judgment.

The facts show on the day of the accident plaintiff was engaged in his employment with T. T. Barge Cleaning Facility stripping chemicals from a barge at the company's plant on the east bank of the Mississippi River.

Suddenly, plaintiff's fellow workers raised an alarm, yelling to him to run for his life because a drifting ship was about to collide with the barges. Plaintiff and his coworkers ran in the same direction away from the potential area of impact, impelled by the fear of explosion, due to the volatile nature of the chemicals in and on the barges. During the flight, plaintiff had to jump down approximately 10 feet to another barge. As he landed, he injured his right foot.

As it turned out, the drifting tanker collided with a fleet of barges next to the one plaintiff had been working on and no explosion occurred. However, the ship sliced in half and sank two barges, and "piled up" the other barges. The entire incident took place in less than a minute.

Following the accident, it was determined the ship's steering failed, causing it to drift and collide with the barges. In turn, the steering failure was caused when a fitting broke. The fitting secured a copper metering line to the starboard hydraulic pressure gauge. As a result, the hydraulic fluid reservoir emptied and the vessel was bereft of steering ability.

Plaintiff subsequently filed an action for negligence pursuant to general maritime law and the law of admiralty against Coronation, United Kingdom, Thenamaris Ship Management, Inc., and the river pilot on the M/T SEABRAVERY at the time of the collision, Terrance Doyle. (Thenamaris Ship Management, Inc., was eventually dismissed on joint motion of the parties.)

Commercial Union Insurance Company intervened to recover compensation benefits and medical payments made to and on behalf of plaintiff under the Longshore and Harborworker's Compensation Act.

The case was tried before a jury on September 26-29, 1989, and October 2-4, 1989. At the close of plaintiff's case, the trial judge granted Terrance Doyle's motion for

involuntary dismissal. Following the trial, the jury returned a verdict finding that the plaintiff sustained an injury in the collision, but also that Coronation was not negligent. Judgment was thereafter rendered on October 5, 1989, dismissing plaintiff's action.

The first issue we are presented with involves the trial judge's refusal to instruct the jury with certain jury charges submitted by plaintiff. The charges relate to the legal presumption of negligence applied by the courts in certain types of maritime collision cases, otherwise known as *allision* in the vernacular of maritime law.

LSA-C.C.P. art. 1793 provides that a party may not assign as error the giving or failure to give a jury instruction unless he has made a specific objection and unless he has stated the grounds for the objection. A blanket objection does not suffice, but must be accompanied by a statement of the grounds of the objection, otherwise it is waived. *Bechtel v. Entringer Bakeries, Inc.*, 422 So.2d 1299 (La. App. 5 Cir. 1982); *see also, Bienvenu v. State Farm Auto. Ins.*, 545 So.2d 581 (La. App. 5 Cir. 1989).

In this case, plaintiff objected to the trial judge's refusal to charge the jury with his requested charges numbered 13-16. Three of those involved the maritime presumption of negligence referred to herein. Plaintiff did not, however, state the grounds for the objections. As a result, the objections were not preserved for appeal and he cannot now assert error in this regard.

Plaintiff next contends the jury committed manifest error in failing to find defendant shipowner negligent. He asserts Coronation negligently failed to follow the manufacturer's steering gear manual by permitting a soldered copper ferrule fitting and copper tubing to be used to connect the starboard steering gauge instead of seamless steel, and in failing to properly inspect this compromise to the system. He also contends the ship-

owner was negligent in operating the vessel with an open isolation valve in violation of the steering manual instructions, and in allowing an inadequate or defective alarm system to exist in the system.

Defendants rebut these allegations, first, by asserting the evidence shows the use of copper was and is common in these types of steering systems. Defendants refer to the manual and claim it does not require the use of seamless steel, although the latter is the material originally placed in the system.

Defendants next point out the testimony indicates the isolation valve is customarily left open while navigating in closed waterways. They assert the manual recommends the valve be kept closed in order to protect the gauges, but there is nothing in the manual which requires the valve to be closed for reasons relating to the integrity of the steering system.

Third, defendants argue the low-level alarm system (which sounds when the hydraulic fluid is low) was neither inadequate nor defective. They point out the evidence shows the alarms on the ship were in accordance with international regulations. They were functioning properly and the crew took the available precautionary measures when the alarms sounded. In addition, defendants contend the alarms were irrelevant to the case because the steering failure occurred only a minute preceding impact and the bridge was aware of the failure before the alarms sounded.

In regard to the issue of Coronation's fault, plaintiff first presented the testimony of J.T. Doyle, the river pilot for the SEABRAVERY, on cross-examination. As a river pilot, Doyle navigates ships in the river between New Orleans and Baton Rouge.

Doyle stated that just before the accident the SEABRAVERY, carrying flammable and volatile jet fuel (naptha), was negotiating a turn in the river. He testi-

fied he gave the command "port 10" to bring the vessel around the bend, then asked for "mid-ship" to stop the turn and straighten the vessel's movement. Doyle said the ship responded properly to the port 10 maneuver, but the rudder failed to respond to the mid-ship command. Doyle stated he quickly asked for a "hard to starboard" position to bring the ship, which was continuing to drift toward land, back to the middle of the river. He again received no response. Doyle said he looked up at the rudder indicator, which remained on "port 10", and he knew there was a problem at that time. Consequently, Doyle told the captain and blew the danger signal.

Doyle stated he saw a push boat and barge carrying a red flag, indicating it contained flammable material, coming toward the ship and he was worried the SEABRAVERY was going to hit it, so he tried to radio a warning. Doyle also called Vessel Traffic Service. He testified the ship missed the oncoming barge, but pushed into a line of barges tied to the shore "like a hot knife going through butter".

Doyle stated that the incident lasted no more than one minute. He noted he was afraid of an explosion during the entire time due to the ship's cargo. He also stated he did not recall hearing the ship's steering alarm sound at any time prior to the impact.

Plaintiff next presented the expert testimony of a marine engineer, Ralston Cole. Cole inspected the ship in April 1989. He explained the steering failed because a line to one of the gauges pulled or was pushed loose from the fitting causing the hydraulic pumps to lose 150 liters of hydraulic fluid at once, resulting in an inability to move the ship's rudder. He pointed out the line which became disengaged was made of copper instead of steel as, he contended, was required by the steering manual. He further stated the fitting used was not designed for the system and that even if a copper line was allowed,

that fitting was not the correct type to connect a copper line. Cole also stated the size of the copper line was inappropriately small.

Cole next discussed the isolation valve. He explained the purpose of the valve is to isolate the gauge from the rest of the system. The closed valve prevents the fluid from flowing past into the gauge portion of the system. He admitted the manual recommends the valve be kept closed, except when reading the gauges in order to protect them, but asserted it also protects the integrity of the system and would also have prevented the fluid to escape in this case. He pointed out the valve was easily opened and closed and stated the stress of leaving the valve open would eventually cause the tubes (lines) to stretch, resulting in inadequate readings from the gauges.

Cole next discussed the alarms related to the steering system. He explained the ship had two alarm systems—one for loss of pressure and one for low level of fluid. He contended the low level alarm was set too low and he believed it failed to sound properly. Otherwise it would have sounded to alert the crew of the failure.

On cross-examination Cole noted the ship was built in 1972 and that he did not know how long the copper line had been in the ship. He stated copper could be sufficiently strong to perform in such a system, but claimed this one was half of the Lloyds Register of Shipping (Lloyds) equation for the pressure involved. (Lloyds he noted, is a British safety regulatory body which describes the manner in which a ship should be built and operated and which inspects ships for insurance purposes annually.) He admitted Lloyds does not prohibit the use of copper and that the Lloyds inspector passed the SEABRAVERY after the accident even though she was again fitted with copper lines in the steering system. He further testified there are no rules or regulations requiring the isolation valve to be closed all the time. He main-

tained his opinion, however, that leaving the valve open impaired the accuracy of the gauges.

Plaintiff also called Scott Hartley, the U.S. Coast Guard inspector who investigated the accident, to the stand. He, like Cole, interpreted the manual to require steel tubing and also believed the isolation valve should be kept closed to prevent fluctuation in the readings. He made no determination about the alarms but in his report stated the accident was caused by a "degree" of negligence on Coronation's part.

On cross-examination, Hartley was questioned about his report, wherein he stated he could not determine whether leaving the valve open was or was not customary among those traveling the Mississippi River, in anticipation of the testimony of defendants' witnesses that it was customary due to the difficulty of navigating the river. In addition, Hartley testified, per his report, that he found no facts indicating any other negligence on the part of Coronation, other than a "degree" of negligence related to their failure to follow the manual (as to the copper lines and open isolation valve).

Defendants presented the testimony of Nicholas Marinos, Evagelos Drakas, and Berend Haveman. Marinos was chief engineer on the SEABRAVERY prior to the accident from May 27, 1987 to August 9, 1987. Drakas was second engineer from January 7, 1987 to December 18, 1987, and was aboard during the collision. Haveman, a marine surveyor, testified as defendants' expert.

Marinos testified the steering system in the SEABRAVERY was the same when the accident occurred as when he came aboard. He contended the use of copper with seamless steel was not uncommon in the shipping industry and that he had seen brass used with steel, as well as copper. He noted he had served on similar or larger ships and never had an inspector or government official require all-steel. Marinos stated he read the

manual when he came on board the SEABRAVERY and agreed it was important to follow its instructions. However, he did not agree with plaintiff's witnesses that the manual required steel to be used in outfitting the system. He pointed out the manual does not specifically state that seamless steel must be used, but only refers to the fact steel was used originally.

In regard to the isolation valve, Marinos testified it was customary on all ships to keep the valve open while traveling closed waterways and, in particular, the Mississippi River, although it only took seconds to open the valve. He stated this was done on the engineer's orders so that the crew would have quick reference to the equipment's functioning because of the added stresses caused by maneuvering in the currents of the river.

Marinos stated everything was in working order when he arrived on the SEABRAVERY, including the low level alarm and pressure alarm. He said the steering equipment with the copper line would not have been disassembled unless a problem was visible, i.e. steam escaping or fluid leakage. Marinos testified the equipment received regular ordinary maintenance and that he was on board in August 1987 when Lloyds inspected and approved the ship in conjunction with Coronation's purchase of the SEABRAVERY at that time.

Drakas testified next for defendants and he supported Marinos' testimony. In addition, Drakas informed the court that he was responsible for the daily maintenance of the steering gear system. In this regard, he noted, he had not observed any unusually high pressures during operation of the system, nor had any problems been evident.

Drakas stated he tested the equipment before the ship left the dock on the day of the collision and it operated properly then and during the trip downriver. He stated

he stayed in the engine room throughout the trip and was there when the equipment failed.

Just prior to impact, Drakas said, the low-pressure alarm sounded in the control room. Drakas sent his third engineer to check the cause and in seconds received orders from the bridge designed to bring the ship away from shore. He testified despite all efforts, however, the ship hit something, throwing him to the floor. He stated the episode lasted no more than a minute, and noted the low-level alarm sounded either at or just after the collision. After the impact, Drakas stated he went to the bridge where the low-level alarm was still sounding.

Drakas testified the broken equipment was replaced with copper, which was inspected and approved by Lloyds and the U.S. Coast Guard. In answer to questioning on cross-examination, he stated (as had Marinos) that he would have changed the pipe fitting had he known it had been soldered, but he could not have made that determination without taking that portion of the system apart.

Defendants' final witness, Berend Haveman, a marine surveyor, explained that Lloyds is a non-profit international group which sets the rules as to how to build, maintain and repair safe vessels. The group, he stated, inspects ships on behalf of most governments. He noted the SEABRAVERY held the highest classification both before and after the collision.

Haveman, a one-time inspector for Lloyds, testified he had examined a number of steering gears similar to the SEABRAVERY's and he stated they were usually made of copper or steel, or copper nickle or stainless. He contended copper is a permitted material and that it is used in about one-third of all vessels. He further stated the size of the tube, contrary to Cole's testimony, is adequate for the pressure. He noted there was nothing visible in his examination of the system shortly after the

collision to indicate problems with the tube and/or the fitting.

In regard to the valve, Haveman stated he read the manual and interpreted the section relating to the isolation valve to mean it should be kept closed solely for the purpose of protecting the gauges. He contended it was better practice to leave the valve open while doing difficult maneuvering in the river so that the crew could discover early signs of malfunction.

Haveman stated he tested the low-level alarm the same evening following the accident when he went aboard the SEABRAVERY to inspect it on defendants' behalf. He testified it worked. He noted the alarm was designed to give reasonable notice that the oil level was low and needed to be replenished, but pointed out that if the system lost pressure, the low-level alarm would ring after the pressure alarm sounded.

In the general introduction section of the steering gear manual, Sub-section 3, it is stated:

> "The Steering Gear is designed to give long and consistent trouble free service, but this service is dependent on the proper operation, care and regular maintenance of the equipment. This Manual gives detailed instructions and information relevant to the carrying out of these procedures and the instructions should be carefully followed to ensure that this trouble free service is realised [sic] in practice."

The references to the material of the lines and the position of the isolation valve, at issue herein, provide as follows:

1. "SMALL BORE PIPING (FIG. 10).

   7.1) In addition to the main pressure piping, seamless steel pressure piping of smaller bore (hence the general term 'small bore

piping') is used in the following hydraulic lines:

Charge
Servo and Isolation Valves
Control
Pressure Gauge
Tank Charging
Drain & Cooling"

2. "4.2) The oil pressure in a steering gear must of necessity, fluctuate according to the operational requirements of the gear. These fluctuations may impair the accuracy in reading of a pressure gauge, so it is recommended that the isolating valves associated with the gauges should be kept closed, except when actual readings of the gauges are being taken."

The jury, presented with conflicting evidence, apparently chose to believe defendants' witnesses regarding the interpretation of these provisions of the manual, the permitted use of copper lines and the custom of traveling in closed waters with the isolation valve open, finding no negligence on the part of Coronation. Where the evidence is conflicting the reasonable evaluation of credibility and inference of facts should not be disturbed by the appellate court. *Rosell v. ESCO*, 549 So.2d 840 (La. 1989). The court of appeal may upset a jury's factual findings only when it is determined the fact finder was clearly wrong. *Arceneaux v. Domingue*, 365 So.2d 1330 (La. 1979). However, "where documents or objective evidence so contradict the witness's story, or that story itself is so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit the witness's story, the Court of Appeal may well find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination." *Rossell v. ESCO*, supra, at 844-845. Furthermore, this court is

not obliged to accept the trier of fact's verdict where it is not supported by objective evidence. See *Shroyer v. Grush*, 555 So.2d 534 (La. App. 4 Cir. 1989).

In this case, the reasonable inferences from reading the manual as a whole, along with the testimony of the witnesses, indicate the material of choice for the system was steel, not copper. Any deviation from the configuration of the original components may have been permitted, but placed a burden of inspection on defendant, because any change challenged the integrity of the system. The procedure to inspect the components was simple and would have revealed the improperly-soldered fitting. And, by admission of the chief engineer and the second engineer, they would not have permitted a soldered fitting to be used had they noticed it, but would have changed it for a more reliable fitting.

Defendant relies on the inspections made by Lloyd's and others, as well as the custom of the industry in this regard. However, neither of these factors relieve defendant of the duty to operate a safe vessel or to use a steering system in accordance with the manufacturer's specifications.

The above-mentioned principles apply to the operation of the isolation valve as well. Over time, such customary acts may have compromised its integrity. Further, had the valve been closed, it clearly would have prevented the loss of the 150 liters of fluid, and the accident would not have occurred.

In regard to the alarm systems, the evidence showed the low-level alarm either sounded too late or not at all, but was of no use in preventing the loss of steering fluid. Had it gone off timely, as intended by its design, the ship's crew could have closed the isolation valve, thus preventing the failed steering and subsequent collision. Thus, we conclude it was not set properly.

After reviewing the testimony and documents in this matter, we can arrive at no other determination than

that the jury was manifestly erroneous in its failure to find Coronation negligent. Even without the benefit of a presumption of negligence being applied to this case, we find the evidence preponderates in favor of plaintiff. Defendant owed a duty to plaintiff to protect him against the injury caused by its failure to operate a safe vessel. It breached that duty and must now compensate plaintiff for the damages he sustained.

Plaintiff claims he suffered a shattered foot bone, resulting in a permanent disability. Additionally, he asserts he suffered a disabling back injury as a result of his attempt to escape the impending collision. For these damages he requests this Court to award him $425,000 for past, present and future pain and suffering, $29,315 for reimbursement of medical expenses and $297,486 for loss of future wages.

Defendant asserts plaintiff suffered a heel injury which he exacerbated. It disputes his back injury allegation, claiming the back injury, if existing, did not result from this accident.

The alleged damages in this case involve a serious foot injury, the development of an abnormal pain reflex called reflex sympathetic dystrophy, about which little is known medically, and a low-back injury to the L5-S1 disc. The medicals are complicated and disputed. Because the jury never reached this issue in the trial court, the manifest error rule does not apply. However, in our opinion a trier of fact should properly resolve this issue. Thus, under our authority to do what is just and proper on the record in a case, we find a remand for a trial on this issue of damages to be warranted. LSA C.C.P. art. 2164.

Accordingly, the judgment of the trial court is hereby reversed and the case is remanded to the trial court for proceedings consistent with this opinion. Appellee is to pay costs of this appeal.

REVERSED AND REMANDED

APPENDIX B

THE SUPREME COURT
OF THE STATE OF LOUISIANA

No. 91-C-0103

GLENN J. CREPPEL, JR.

vs.

CORONATION SHIPPING CO.,
THENAMARIS MANAGEMENT INC. and
TERRANCE DOYLE

IN RE: Coronation Shipping Co.; United Kingdom SS Assn Bermuda;—Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fifth Circuit, Number 90-CA-0425; Parish of Jefferson 24th Judicial District Court Div. "C" Number 359-213

February 22, 1991
Denied.

HTL
PFC
JLD
LFC
PH

MARCUS, J., would grant the writ.
WATSON, J., recused.

Supreme Court of Louisiana
February 22, 1991

/s/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

APPENDIX C

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

No. 359-213 Division "C"

GLENN J. CREPPEL, JR.

versus

CORONATION SHIPPING CO.,
THENAMARIS SHIP MANAGEMENT, INC.
and TERRANCE DOYLE

JURY INTERROGATORIES

1. Do you find that from a preponderance of the evidence that plaintiff, Glenn J. Creppel, Jr., sustained an injury on October 20, 1987?

   YES ✔ NO ———

   If your answer is yes, go on to question no. 2. If your answer is no, sign the end of the form and return to the Courtroom.

2. Was the defendant, Coronation Shipping Company, Inc., and their insurer, United Kingdom Mutual Steamship Assurance Association (Bermuda), Limited, negligent?

   YES ——— NO ✔

   If your answer is yes, go on to question no. 3. If your answer is no, sign the end of the form and return to the Courtroom.

3. Was plaintiff contributorially negligent in any way that proximately caused or contributed to his injury on October 20, 1987?

YES ——— NO ———

If your answer is yes, go on to question no. 4. If your answer is no, go on to question no. 4

4. Taking the combined substandard conduct that caused this accident, if any, as one hundred (100%) per cent, what percentage of that substandard conduct was attributable to Coronation Shipping Company, Inc., and their insurer, United Kingdom Mutual Steamship Assurance Association (Bermuda), Limited, if any; and what percentage of that substandard conduct, if any, was attributable to Glenn Creppel?

Percentage of substandard conduct attributable to Coronation Shipping Company, Inc., and their insurer, United Kingdom Mutual Steamship Assurance Association (Bermuda), Limited? —— %
Percentage of substandard conduct attributable to Glenn J. Creppel? —— %

5. Do you find from a preponderance of the evidence that plaintiff injured his lower right extremity on October 20, 1987?

YES ——— NO ———

Go on to question no. 6.

6. Do you find form [sic] a preponderance of the evidence that plaintiff injured his lower lumbar spine on October 20, 1987?

YES ——— NO ———

Go on to question no. 7.

7. Do you find that the defendant, Coronation Shipping Company, Inc., and their insurer, United Kingdom Mutual Steamship Assurance Association (Bermuda), Limited, acted willfully and with gross disregard of the plaintiff's rights to support an award of punitive damages?

YES ——— NO ———

If your answer to question no. 7 is yes, go on to question no. 8. If your answer to question no. 7 is no, go to question no. 10.

8. Do you find that punitive damages should be awarded against the defendant, Coronation Shipping Company, Inc., and their insurer, United Kingdom Mutual Steamship Assurance Association (Bermuda), Limited?

YES ——— NO ———

If your answer to question no. 8 is yes, go on to question no. 9. If your answer to question no. 8 is no, go to question no. 10.

9. If so, what amount should be awarded in punitive damages?

$ ———

Go on to question no. 10.

10. Fill in the amount of damages, if any, that will fairly and adequately compensate Glenn Creppel for his damages. (Do not make any reduction in amount if you have found that plaintiff was negligent. If any reduction is appropriate, the Court will make it.)

(a) The amount he is due, if any, for loss of wages from the date of the accident up to the date of this trial? $———

(b) The amount he will lose in earnings, if any, after the date of this trial? $_____

(c) The amount due him, if any, for past, present and future physical pain and suffering on account of the injury to his heel pad, os calcis, subtalar joint and/or sympathetic dystrophy? $_____

(d) The amount due him, if any, for past, present and future physical pain and suffering on account of the injury to his lumbar spine? $_____

(e) The amount you find to be due him, if any, for past, present and future mental anguish, worry and emotional distress? $_____

(f) The amount you find to be due him, if any, for past medical expenses? $_____

(g) The amount you find to be due him, if any, for future medical expenses? $_____

Foreperson: /s/ Wilbur L. Candebat, Sr.
Date: 10-4-1989

APPENDIX D

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

No. 359-213 Division "C"

GLENN J. CREPPEL, JR.

versus

CORONATION SHIPPING COMPANY,
THENAMARIS SHIP MANAGEMENT, INC.,
and TERRANCE DOYLE

JUDGMENT

[Filed Oct. 5, 1989]

Considering the verdict rendered by the jury on 4 October 1989;

IT IS ORDERED, ADJUDGED, AND DECREED, that there be judgment in favor of defendants Coronation Shipping Company, Ltd. and The United Kingdom Steam Ship Assurance Association (BERMUDA), Ltd. and against plaintiff Glenn J. Creppel, Jr., dismissing plaintiff's complaint with prejudice, plaintiff to bear all costs.

Gretna, Louisiana, this 5 day of October, 1989.

/s/ Joseph F. Grefer
JUDGE GREFER

Respectfully submitted,

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(BERMUDA), Ltd.

CERTIFICATE OF SERVICE

I certify that the foregoing has been served on counsel of record by depositing same in the U.S. Mail, postage prepaid, this 5th day of October, 1989.

/s/ Robert H. Murphy
ROBERT H. MURPHY

APPENDIX E

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

No. 359-213
Division "C"

GLENN J. CREPPEL, JR.

VS.

CORONATION SHIPPING CO., *et al.*

FILED: January 16, 1990 [Illegible] Dy. Clerk

JUDGMENT

This matter came for hearing on a Motion for Judgment Notwithstanding the Verdict and/or a Motion for a New Trial as regularly scheduled on December 18, 1989.

Present: Phillip Boudesque and T. C. Wicker, attorneys for plaintiff.

Robert Murphy and Thomas Forbes, attorney for defendants.

After hearing the argument of counsel and considering the law and the evidence to be in favor of the defendants.

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Judgment Notwithstanding the Verdict and the Motion for a New Trial are denied.

JUDGMENT READ, RENDERED AND SIGNED in Open Court in Gretna, Louisiana, this 16 day of January, 1990.

/s/ Joseph F. Grefer
Judge

(2)

No. 90-1773

Supreme Court, U.S.
FILED
JUN 17 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

CORONATION SHIPPING COMPANY,

and

THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED,

Petitioners,

v.

GLENN J. CREPPEL, JR.

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal, Fifth Circuit, State Of Louisiana

RESPONSE TO WRIT OF CERTIORARI

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I. SUMMARY OF ARGUMENT

Petitioners have filed this Petition for Writ of Certiorari to the Court of Appeals, Fifth Circuit, State of Louisiana, seeking to have the writ granted by setting forth fears that defendants in maritime cases properly filed in state court are "homered" under state law inconsistent with federal law. However, Petitioners' argument is faulty because it is based on misrepresentations of case law from Louisiana courts. Petitioners also ignore the facts of this case as reviewed fairly and objectively by the Court of Appeals. Petitioners instead present to this Honorable Court a myopic view of the evidence rightfully disregarded by the Court of Appeals and the Louisiana Supreme Court.

II. ARGUMENT

A. THE EVIDENCE AS PRESENTED AT TRIAL

The Court of Appeals, in its decision in this matter reported at 572 So.2d 1051-58, spent more than half of its opinion reviewing what Petitioners self-servingly term as the conflicting evidence. The Appeals Court set forth in depth the testimony of the various witnesses and the documentary evidence on liability introduced by both sides. Respondent points out to this Honorable Court that Petitioners present only their "tunnel vision" view of the facts, ignoring the inconsistencies in their own evidence as found by the Court of Appeals in reversing the jury verdict.

Briefly, for example, Petitioners fail to quote the sections of the Steering Gear Manual entered into evidence

on the issue of whether or not only seamless steel tubing should be used in the hydraulic steering lines and cited by the Court of Appeals, as follows:

> "The Steering Gear is designed to give long and consistent trouble free service, but this service is dependent on the proper operation, care and regular maintenance of the equipment. This Manual gives detailed instructions and information relevant to the carrying out of these procedures and the instructions should be carefully followed to ensure that this trouble free service is realised [sic] in practice."

Id. at 1056-1057.

As the Court of Appeals stated, "the reasonable inferences from reading the manual as a whole, along with the testimony of the witnesses, indicate the material of choice for the system was steel, not copper." *Id.* at 1057. The deviation in the configuration of the system from steel to copper placed a duty on Petitioners to inspect the compromised system, a simple process which would have easily led to discovery of the improperly soldered fitting that even Petitioners' witnesses stated they would have replaced had they known about it. *Id.*

Similarly, in regard to the issue of the open isolation valve, the testimony of the witnesses conflicted but the Court of Appeals found that the same principles applied as with the material used for the tubing. The court cited the Steering Gear Manual once again.

1. "SMALL BORE PIPING (FIG. 10).

   7.1) In addition to the main pressure piping, seamless steel pressure piping of smaller bore (hence the general term

'small bore piping') is used in the following hydraulic lines:

Charge
Servo and Isolation Valves
Control
Pressure Gauge
Tank Charging
Drain & Cooling

2. "4.2) The oil pressure in a steering gear must of necessity, fluctuate according to the operational requirements of the gear. These fluctuations may impair the accuracy in reading of a pressure gauge, so it is recommended that the isolating valves associated with the gauges should be kept closed, except when actual readings of the gauges are being taken."

Id.

The Court then stated that the only reasonable inferences from the testimony were two. First, any deviation from the Steering Gear Manual by customarily leaving the valves open when steering in closed waters may have compromised the system. Second, and more importantly, "had the valve been closed, it clearly would have prevented the loss of the 150 liters of fluid, and the accident would not have occurred." *Id.*

In regard to the issue about the alarms, the Court of Appeals reviewed the evidence and again found as follows:

> [T]he low-level alarm either sounded too late or not at all, but was of no use in preventing the loss of steering fluid. Had it gone off timely, as intended by its design, the ship's crew could

> have closed the isolation valve, thus preventing the failed steering and subsequent collision. Thus, we conclude it was not set properly. *Id.*

Thus, as opposed to the one-sided view of the facts Petitioners still cling to, the evidence only led to one conclusion: Petitioners failed to operate a vessel with reasonable care under the circumstances, *i.e.*, failed to operate a safe vessel.

B. THE COURT OF APPEAL DID NOT ALTER THE MARITIME NEGLIGENCE STANDARD OF CARE.

Petitioners' first "reason for granting the writ" is that the Court of Appeals altered the maritime standard of care from "reasonable care under the circumstances" to "a duty to operate a safe vessel." This argument is unfounded. Clearly, as set forth above, the Court of Appeals objectively reviewed the evidence and found that the Petitioners did not operate their vessel with reasonable care under the circumstances. Petitioners are simply playing a game of semantics.

In support of their argument, Petitioners raise the unfounded fear that the "Court of Appeals' refusal to apply established maritime law has international implications far beyond this case." Petitioner's Brief at 14. Respondent submits that the international implications in this case are pure and simple: Vessel owners will not be allowed to operate a rudderless, free-floating ship in the Mississippi River with impunity, *i.e.*, total disregard for the integrity of the vessel's steering system. For Petitioners to argue under the facts of this case that the Court of Appeals held them to a higher standard is ludicrous.

The facts show that Petitioners failed miserably to exercise reasonable care under the circumstances.

C. THE LOUISIANA COURT OF APPEALS UPHELD BOTH THE UNIFORMITY DOCTRINES AND FEDERAL MARITIME LAW IN PROPERLY REVIEWING THIS MATTER ON APPEAL.

In making their argument that the Court of Appeals erred in its review of this matter, Petitioners' argument errs both in their review of Louisiana case law and their interpretation of the appellate review in this matter. Simply put, the Court of Appeals applied the correct standard of review, a standard Petitioners agreed to before the Court of Appeals.

Petitioners first argue that under *Daigle v. Coastal Marine, Inc.*, 488 So.2d 679 (La. 1986), the Louisiana Supreme Court has ignored federal maritime law and has applied its own version of law to maritime actions filed in Louisiana State Courts. Yet, it is Petitioners who ignore and misinterpret the plain language of *Daigle*.

The plaintiff in *Daigle* slipped on a vessel stairway and injured his back while a passenger on the vessel. *Id.* at 680. The Louisiana Supreme Court in a *per curiam* decision held that the case was controlled by Louisiana substantive tort law and procedural law under the Outer Continental Shelf Lands Act, 43 U.S.C. 1333 *et seq. Daigle* at 681-682. Thus, the Court held that "procedural law of Louisiana controls as to the scope of appellate review." *Id.* at 682.

In *Daigle* the Louisiana Supreme Court *did not* hold that Louisiana substantive and/or procedural law supplanted federal maritime law. In fact, it acknowledged that "[t]he federal standard of review for claims under federal maritime law is whether reasonable men could have arrived at a contrary verdict. [Citations omitted.] Factual findings are reviewed under the 'clearly erroneous standard.' " *Id.* at 681, n. 5. Because *Daigle* was not a case under general maritime law but one under the Outer Continental Shelf Lands Act, general maritime law with its law of appellate review were inapplicable.

In this case, the Court of Appeals did not review the evidence pursuant to Louisiana law but followed applicable general maritime law standards. The Court of Appeals found that the evidence led to "no other determination than that the jury was manifestly erroneous in its failure to find Coronation negligent." *Creppel* at 1057-1058. Although the Court used the term "manifest error," the Louisiana Supreme Court in *Rosell v. Esco*, 549 So.2d 840 (La. 1989) equated the "manifest error" standard of review with the "clearly erroneous" standard of review, even referring to it as one standard, the "manifest error – clearly wrong standard." *Id.* at 844. "Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be manifestly erroneous or clearly wrong." *Id.* This review does not permit a *de novo* review of the facts. *Id.*

However, "[w]here documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact finder would not credit the witness' story, the Court of Appeals may well find manifest error or

clear wrongness even in a finding purportedly based on a credibility determination." *Id.* at 844-845.

Indeed, in *Shroyer v. Grush*, 555 So.2d 534 (La. App. 4th Cir. 1989), *cert. denied*, 559 So.2d 140, a case cited by the *Creppel* court in discussing the appropriate standard of review, the standard for clearly wrong or manifestly erroneous was interpreted to be the same as that set forth in *McAllister v. United States*, 348 U.S. 19, 20 (1954), *i.e.*, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Importantly, it should be noted that Petitioners cite *McAllister* as setting forth what they believe should have been the appropriate standard of review in this case. Petitioners' Brief at 18. Thus, it is clear that Petitioners' argument is much ado about nothing and should be denied summarily.

Additionally, as noted earlier, Petitioners believed the Court of Appeals' review under the "manifest error" standard was correct, stating in their brief to the Court of Appeals that "Plaintiff correctly states that review of the jury's verdict is governed by the 'manifest error' rule," citing *Rosell v. Esco*. Brief on behalf of Defendant-Appellee, Coronation Shipping Company and the United Kingdom Mutual Steam Ship Association (Bermuda) Limited. See Appendix hereto, p. 26.

Vaguely and in a confusing manner, Petitioners also attempt to argue that the standard of appellate review in this case should be even higher than the *McAllister* standard because Respondent failed to move for a directed verdict following the *close* of all evidence. Petitioners'

Brief at 18-19. There is doubt that this is legally correct because Petitioners' cite *Scheib v. Williams-McWilliams Co.*, 628 F.2d 509 (5th Cir. 1980) in support of this argument. *Scheib* is an admiralty case, but that portion of *Scheib* supporting Petitioners' argument quotes *Coughlin v. Capital Cement Co.*, 571 F.2d 290, 297 (5th Cir. 1978). *Coughlin* is an antitrust matter, not a maritime case, so it is doubtful that *Scheib* is even applicable. Petitioners' argument must fail.

Even assuming, for purposes of argument only, that Petitioners' argument is legally valid, which Respondent denies, Petitioners misquote *Scheib*, citing only half of the standard of review. The full citation with emphasis on the omitted portion reads as follows:

> The inquiry is restricted to "whether there was any evidence to support the jury's verdict, irrespective of its sufficiency, *or whether plain error was committed, which, if not noticed, would result in a 'manifest miscarriage of justice.'* " *Scheib* at 512, quoting *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir. 1978).

The force of the Court of Appeals' opinion shows that there was no evidence to support the jury's verdict and it amounted to a "manifest miscarriage of justice." The Court of Appeals stated that "it could arrive at no other determination than that the jury was manifestly erroneous in its failure to find Coronation negligent." *Creppel* at 1057-1058. In other words, the jury's verdict was a "manifest miscarriage of justice."

Finally, Respondent notes that Petitioners cite *Rosell v. Esco* in their brief when discussing the standard of appellate review. Petitioners' Brief at 20. This citation

indicates Petitioners know of the single "manifest error – clearly wrong" standard that is equivalent to the "clearly erroneous" standard. Petitioners state that despite this "theoretical" standard, however, the Court of Appeals "in practice" reweighed the facts or, in effect, reviewed the facts *de novo*.

That is not what the Court of Appeals did. The Court of Appeals reviewed the evidence objectively and did not reweigh it. The Louisiana Supreme Court agreed, denying writs of certiorari. Upon review, the Court of Appeals found clear error, *i.e.*, the evidence showed *only* that the Petitioners were negligent, with no other possibility to support the jury's verdict.

III. CONCLUSION

Petitioners seek to have this Honorable court issue writs of certiorari to the Louisiana Court of Appeals, Fifth Circuit, after it rightfully and legally reviewed this matter in depth and overturned a manifestly erroneous/clearly erroneous jury verdict. The Court of Appeals did not reweigh the evidence. It reviewed the evidence objectively and found the Petitioners fell woefully short of operating a vessel on the Mississippi River with reasonable care. Indeed, the Court of Appeals found Petitioners' operation of a 620-foot tanker without steering on the Mississippi River to be totally unreasonable.

In doing so, the Court of Appeals applied the correct standard of review under general maritime law and *did not* substitute Louisiana law. As has been shown, Louisiana Courts have construed the "manifest error" standard

of appellate review to be the same as the "clearly erroneous" standard.

Accordingly, Respondent respectfully suggests the decision of the Court of Appeals, State of Louisiana, merits no further review.

Respectfully submitted:

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COURT OF APPEAL

FIFTH CIRCUIT

STATE OF LOUISIANA

NO. 90-CA-425

GLENN J. CREPPEL, JR.,
Plaintiff-Appellant,

versus

CORONATION SHIPPING COMPANY,
Defendant-Appellee

Civil Appeal from the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, No. 359-213 "C", Honorable Joseph F. Grefer, Judge

---

BRIEF ON BEHALF OF DEFENDANTS-APPELLEES, CORONATION SHIPPING COMPANY AND THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED

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JURISDICTION OF THE COURT

This is an appeal from a final judgment after a jury trial on the merits in the 24th Judicial District Court for the Parish of Jefferson, the Honorable Joseph F. Grefer presiding. This Court has jurisdiction pursuant to La. Const. 1974, Art. V, Sec. 10(A) and La. Code Civ. P. art. 2083.

PRINCIPLES OF LAW

1. Review of the jury's verdict is governed by the "manifest error" rule. *Rosell v. Esco*, 549 So.2d 840, 844 (La. 1989). Where there is a conflict in the testimony, the

jury's evaluations of credibility and reasonable inferences of fact may not be set aside by the appellate court. *Id.* Where the jury's decision and findings are reasonable in light of the record reviewed in its entirety,

> the court of appeal may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong.

Id., 549 So.2d at 844.

2. The function of the jury, not the court of appeal, is to hear the evidence and make determinations regarding the credibility of the witnesses, "for only the factfinder can be aware of the variations in the demeanor and tone of the voice that bear so heavily on the listener's understanding and belief in what is said." *Rosell v. Esco, cited above.*

3. "The rule that questions of credibility are for the trier of fact applies to the evaluation of expert testimony, unless the stated reasons of the expert are patently unsound." *Lirette v. State Farm Insurance Co.*, 563 So.2d 850, 1990 LEXIS 1410 (La. 6/14/90).

4. "A party may not assign as error the giving or the failure to give an instruction unless he objects thereto either before the jury retires to consider its verdict or immediately after the jury retires, stating specifically the matter to which he objects **and** the grounds of his objection." La. Code Civ. P. art. 1793(C).

5. La. Code Civ. P. art 1793 **requires** that the party not only inform the trial judge **on the record** of the matter to which he objects, but also regarding the specific grounds of his objection. *E.g., Bienvenu v. State Farm Mutual Auto Ins. Co.*, 545 So.2d 581, 587 (La. App. 5th Cir. 1989); *Bechtel v. Entringer Bakeries, Inc.*, 422 So.2d

1299, 1302 (La. App. 5th Cir. 1982); *Anderson v. Fowler Trucking, Inc.*, 506 So.2d 1319, 1324 (La. App. 2d Cir.), *writ denied*, (La. 1987).

6. A blanket objection that does not state the specific grounds for objection does not comply with the provisions of Article 1973 and does not preserve the issue for appeal. *Brechtel*, 422 So.2d at 1302; *Anderson*, 506 So.2d at 1324.

7. An objection made in chambers and off the record does not satisfy the requirements of Article 1793 and does not preserve the issue for appeal. *Smiciklas v. Groendyke Transport, Inc.*, 505 So.2d 775, 778 (La. App. 2d Cir.), *writ denied*, 506 So.2d 1231 (La. 1987).

8. A mere expression of "concern" regarding the trial court's refusal to give a jury instruction does not preserve the issue for appeal. *Anderson v. Fowler Trucking, Inc.*, 506 So. 2d 1319 (La. App. 2d Cir.), *writ denied*, 512 So.2d 434 (La. 1987).

9. The presumption of negligence in favor of a party who sustains damage or injury as a result of a moving vessel colliding with a stationary dock or vessel has only been applied in favor of those directly injured or damaged as a result of the impact of the moving vessel with the stationary dock or vessel; it has not been applied to those who are indirectly injured as a result of the allision. *See, e.g., The OREGON*, 158 U.S. 186, 15 S.Ct. 804, 39 L.Ed. 943 (1895); *The Baltimore Steam Packet Co. v. The Flushing, College Point and New York Steam Ferry Co.*, 70 U.S. (3 Wall.) 164, 18 L.Ed. 85 (1866); *American Petrofina Pipeline Co. v. M/V SHOKO MARU*, 837 F.2d 1324 (5th Cir. 1988); *James v. River Parishes Co., Inc.*, 686 F.2d 1129 (5th Cir. 1982); *Weyerhaeuser Co. v. Vessel ATROPOS ISLAND*, 777 F.2d 1344 (9th Cir. 1985).

10. The adequacy of the instructions given to the jury are determined in light of the instructions as a whole; for reversal of a jury verdict to be in order, the charge must be so incorrect or inadequate so as to preclude

the jury from reaching a verdict based on the law and the facts. *E.g., Anderson v. Fowler Trucking, Inc.*, 506 So. 2d 1319, 1924-25 (La. App. 2d Cir.), *writ denied*, 512 So.2d 434 (La. 1987).

11. The trial judge is not required to give the exact instructions requested by a party, but only to charge the jury as to the applicable law in such a fashion as to reduce the possibility of confusing the jury. *Cuccia v. Cabrejo*, 429 So.2d 232, 235 (La. App. 5th Cir.), *writ denied*, (La. 1983).

12. The appellate courts exercise great restraint before reversing the verdict of the jury on the suggestion that the jury instructions are erroneous. *Cuccia v. Cabrejo, cited above; Creel v. S.A. Tarver & Son Tractor Co., Inc.*, 537 So.2d 752, 754 (La. App. 1st Cir. 1988).

13. Even where the jury is improperly instructed, "the appellate court may review the facts in the record and affirm the verdict if it is consistent with the evidence." *Broome v. Gauthier*, 443 So.2d 1127, 1134-35 n.3 (La. App. 4th Cir. 1983), *writ denied*, (La. 1984).

14. "[W]here the weight of the evidence is so nearly equal that a first-hand view of the witnesses is essential to a fair resolution of the issues," the appellate court should remand for a new trial rather than render a verdict in the case. *See Ragas v. Argonaut Southwest Insurance Co.*, 388 So.2d 707, 708 (La. 1980); *Bridevaux v. Marchand*, 543 So.2d 930, 933 (La. App. 1st Cir. 1989).

15. A tort plaintiff has a duty to mitigate his damages. *See Philippe v. Browing Arms Co.*, 395 So.2d 310, 318 n. 12 (La. 1981); *Schroeder v. Di Pascal Cabinet Co., Inc.*, 467 So.2d 1380 (La. App. 5th Cir. 1985); W. Prosser, *Law of Torts*, § 65 at 422 (4th Ed. 1971) (as cited and quoted in *Philippe*).

STATEMENT OF THE CASE AND ACTION OF THE TRIAL COURT

A. Introduction

This civil case arises from the October 20, 1987 allision between the M/T SEABRAVERY and the ACBL Barge Fleet, located on the east bank of the Mississippi River in Harahan. There is no dispute regarding the underlying facts giving rise to plaintiff's injury. The SEABRAVERY suddenly and unexpectedly lost her steering when a fitting on a steering system hydraulic line connecting a pressure gauge to the line unexpectedly separated, resulting in a loss of hydraulic pressure that rendered the vessel's steering inoperative. Plaintiff-appellant, Glenn J. Creppel, an employee of TT Barge Cleaning, an upriver facility, injured himself when he jumped from the tier of barges upon which he was working to another barge deck approximately ten feet lower.

A twelve person civil jury, after considering all of the testimony and evidence, fully exonerated Coronation Shipping Company and its protection and indemnity insurer, The United Kingdom Mutual Steam Ship Assurance (Bermuda) Limited (collectively referenced herein as "Coronation" or "defendant"), of all negligence regarding the steering failure. Appellant Creppel now questions this jury verdict. By discussing and arguing only the limited trial evidence adduced in his favor, by making emotional pleas, and by arguing matters that have little or no significance to the established cause of the collision, Creppel would have this Court believe that the jury's verdict is totally unreasonable and unsupported by the record. However, as the jury found, substantial testimony

and evidence, indeed the overwhelming evidence, demonstrates that Coronation was not negligent, and thus, was not responsible for plaintiff's injury.

The function of an appellate court is to review the jury's verdict, not to retry the case. Coronation submits that this Court, upon reviewing the testimony and evidence, should affirm the trial court's judgment and jury verdict in its favor. There is no factual or legal basis for reversing the jury verdict in this case.

B. The Allision

On October 20, 1987, New Orleans-Baton Rouge River Pilot J.T. Doyle boarded the M/T SEABRAVERY while she was dockside at Shell Oil Company's Norco facility (R.6, 1172-73).[1] Doyle was to take the vessel, which had just completed loading its cargo of Naptha, downriver to New Orleans (*id.*).

Approximately an hour before the vessel departed Norco, her crew thoroughly checked her mechanical gear, including her steering system (R.9, 1954, 1956-57). The inspection revealed no problems (*id.*). The vessel began her voyage and navigated flawlessly from Norco to 12 Mile Point (R.6, 1191). In negotiating 12 Mile Point, Pilot Doyle ordered the vessel's rudder ten degrees to port (R.6, 1176-78). The vessel responded without problem (*id.*). Next, he ordered an amidships rudder command to

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[1] Appellee cites to the record and transcript by using the designation "R" and the volume number, followed by the specific page references. Thus, record volume six, pages 1172 and 1173 are cited as "R.6, 1172-73".

stop the vessel's leftward swing (*id.*). The rudder did not respond, and the vessel was rapidly headed toward the east bank (*id.*, R.6, 1182). Pilot Doyle then gave a hard starboard rudder command, but the rudder did not respond (R.6, 1179). With collision then imminent, he blew the danger signal and radioed the Coast Guard and other vessel traffic in the area (R.6, 1183, 1192). Seconds later, and only about a minute after she lost her steering, the SEABRAVERY collided with the ACBL Barge fleet (R.6, 1187, 1189).

The ship's duty engineer became aware of the steering loss about the same time as the pilot. About a minute before impact, the steering system low pressure alarm sounded in the engine room (R.9, 1958-61). The duty engineer, while busy in the engine room executing the engine commands being ordered by the pilot, immediately sent the Third Engineer to check the steering equipment (*id.*). Seconds later, the vessel collided with the ACBL fleet (*id.*).

Immediately before the allision, plaintiff and his co-workers at the TT Barge Cleaning facility, located upriver from the ACBL fleet, were cleaning chemical barges (R.5, 1067-68). They noticed the vessel approaching the east bank about thirty seconds before collision when she was about 250 yards away (R.5, 1092). Plaintiff, who was working on the wing tank of a barge, heard a co-worker and his foreman yell for everyone to run (R.6, 1342-43). There was no emergency access to shore from barges upon which he was working (R.5, 1099). Plaintiff took a different route from his co-workers, because the barges were not secured tightly together by his employer, causing the barge to which he was going to jump to drift

away from the barge he was on (R.6, 1345; R.8, 1738-42). Plaintiff jumped down about ten feet to the deck of a neighboring barge, sustaining the right heel injury of which he complains (R.8, 1739).

C. The Cause of the Steering Failure

The SEABRAVERY, like most other oceangoing vessels, is equipped with an electrohydraulic steering system (R.9, 1913-14). That is, electric signals coming from the steering wheel on the ship's bridge activate valves in the steering machinery in the steering gear flat above the rudder. The valves, in turn, direct hydraulic fluid under pressure to move the ship's rudder (R.6, 1238). The system operates within set pressure limits (R.9, 1925, 1955, 1995), and the pressure is monitored by means of gauges connected to the pressure lines (*see generally* R.9, 1941, 1991-92). Any major breach of this pressurized system, such as a broken line, results in a loss of steering pressure to the rudder, and consequently, to loss of the vessel's steering (R.9, 2003-04).

The SEABRAVERY lost her steering when an internal fitting at a pressure gauge failed, causing hydraulic fluid to be pumped out of this open line (R.6, 1306).

D. The Jury Weighs Plaintiff's Allegations of Negligence

Based primarily on the testimony of a single expert witness, (whose expertise was questionable since he had never qualified as an expert in steering systems and had never sailed on an ocean-going vessel) and upon gross

misconstructions of the physical evidence and the testimony of other trial witnesses, plaintiff argued to the jury, and now argues to this Court, that defendant was negligent in the following respects: (1) in allowing copper tubing, rather than stainless steel tubing, to connect the pressure gauge to the steering hydraulic lines; (2) in failing to open up and inspect the fitting that failed; (3) in allowing the pressure gauge "isolation valve" to remain open while the vessel was maneuvering in the river; and, (4) in operating a vessel with inadequate and inadequately installed alarms on the steering system. See appellant's original brief, 6-21.

The jury, after weighing all the evidence, including the substantial evidence discussed below that plaintiff has chosen not to discuss in his brief, concluded that plaintiff's allegations of negligence were without merit.

1. The Copper Tubing

Plaintiff's counsel argued before the trial court and now argues before this Court that allowing copper tubing to connect the pressure gauge to the steering system hydraulic lines was improper because the steering gear manual (which plaintiff's counsel consistently referenced in his questions to the witnesses as a "Bible") allegedly "required" the use of stainless steel. See appellant's brief, 7-15.

Plaintiff's expert, Ralston Cole, whose maritime experience consisted of limited service in the Navy and experience with river towboats, who had never been qualified as an expert on steering systems, and who had never served aboard a merchant, ocean-going vessel, did

testify that the steering gear manual "required" the use of stainless steel, rather than copper, tubing to connect the gauge (R.6, 1248-49). Additionally, as plaintiff mentions, Coast Guard Lt. Cmdr. Scott Hartley, who investigated the casualty, indicated that copper tubing is not mentioned by the manual (R.6, 1312). However, contravening this testimony was substantial testimony and evidence, including the steering gear manual itself, which demonstrated that copper tubing was acceptable, that stainless steel tubing was not required, and that the use of copper tubing did not constitute negligence.

The steering gear manual itself (Trial Ex. P-36) does not prohibit the use of copper tubing to connect the pressure gauge to the steering hydraulic system. While the manual indicates that when the ship was built stainless steel tubing was used, there simply is no language in the manual "requiring" that stainless steel be used, or prohibiting the use of copper tubing in making repairs to the system.

Furthermore, with the exception of plaintiff's expert, no witness testified that stainless steel tubing was "required" and that copper tubing was prohibited.

Defendant's expert, Berend Haveman, had substantial maritime experience, having served as a chief engineer on ocean-going vessels, and having been employed in the maritime industry as a ship construction supervisor and as a marine surveyor for over twenty-five years (R.9, 1978-82). He explained that the SEABRAVERY was entered in Lloyds Register of Shipping, an international nonprofit organization that sets the rules and standards for ship repair and construction and that inspects and

classifies vessels for most nations worldwide (R.9, 1984-85). The SEABRAVERY had the highest Lloyds rating (R.9, 1985).

Haveman testified that Lloyds rules authorize copper or steel to be used for the connection in question, and that there was no reason why copper could not be used on the SEABRAVERY (R.9, 1986-87, 1989). As a marine surveyor, and as a former Lloyds surveyor, he would not require copper tubing to be changed (R.9, 1988). Furthermore, the manufacturer's original use of steel does not require replacement with steel (R.9, 1989). Regarding the steering gear manual, he stated that just because the manufacturer uses a particular material in the original construction, that does not make use of the material mandatory (R.9, 2002).[2] Indeed, Haveman testified that

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[2] Appellant contends that Haveman did not testify that the *mixing* of copper and steel tubing was common and proper, but only that copper *or* steel could be used. Thus, appellant suggests that this Court should draw an inference that Haveman did not approve the use of the copper tubing on the SEABRAVERY to connect the pressure gauge to the steering hydraulic piping. *See* appellant's original brief, 11-12.

Appellant's suggestion is absurd and is nothing more than an improper distortion of the witness's testimony. Haveman was not asked the specific question whether the *mixing* of copper and steel pipe was proper. However, Haveman's testimony, taken in its entirety, plainly indicates that the tubing as it existed on the SEABRAVERY was proper and did not violate any Lloyds rule. In fact, he specifically testified that he examined the copper piping connecting the pressure gauge on the SEABRAVERY and would not have required that the copper be replaced or removed (R.9, 1988). Thus, appellant's suggested inference cannot be drawn from Haveman's testimony. The

(Continued on following page)

Lloyds inspected the vessel on August 1, 1987, just nineteen days before the casualty, and was issued certificates of approval (R.9, 1994).

Nicholas Marinas, served as the Chief Engineer aboard the SEABRAVERY on from May 29, 1987 until August 9, 1987, and was a member of the crew on August 1, 1987, the date the vessel was sold to defendant and inspected by Lloyds (R.9, 1911, 1913, 1916, 1920). he had served on approximately fifteen vessels as a chief engineer (*id.*). He testified that the steering gear hydraulic lines were never changed or repaired during the time he was on board, because there appeared no sign of any leaks or anything else wrong with the lines (R.9, 1918-19). Chief Engineer Marinas explained that the steering gear hydraulic lines on the vessels that he had served were made of copper and steel, and that it was not unusual for such lines to be made of copper (R.9, 1915-18). The SEABRAVERY was not the only vessel upon which he had seen copper lines with steel fittings (R.9, 1937, 1939). Regarding the steering gear manual, Marinas testified that he had read and was familiar with the manual, and that it did not prohibit the use of copper tubing (R.9, 1936-37).

Chief Engineer Marinas was on board the vessel when she was inspected by the Lloyds classification inspector upon the change of the vessel's ownership (R.9, 1920). He testified that Lloyds inspected the vessel and

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jury obviously recognized the false premise forming the basis of appellant's argument in rejecting the plaintiff's contention that the copper pipe was improper.

issued her certificates, finding no deficiencies (R.9, 1920-24). During the course of this inspection, the Lloyds inspector checked the lines and made no requirements that they be changed (*id.*). Marinas left the service of the vessel for personal reasons on August 9, 1987, eleven days before the casualty (R.9, 1912).

Second Engineer Evagelos Drakas, who had served aboard nine vessels as a second engineer, and who was on board the vessel at the time of the casualty, testified that some of the ships on which he had served had copper lines and some had steel (R.9, 1950-51). The lines aboard the SEABRAVERY while he was aboard had never been replaced or taken apart, because the crew had never seen any signs of leakage (R.9, 1952-53).

Drakas was on board the SEABRAVERY for the Lloyds general inspection on August 1, 1987 (R.9, 1954-55). Lloyds found nothing abnormal and did not require the vessel to replace the copper tubing (*id.*; R.9, 1966). The vessel was also inspected by the U.S. Coast Guard, who did not require the vessel to replace the copper piping (R.9, 1966, 1969-70). Drakas testified that nothing in the manual prohibited the use of copper tubing to connect the pressure gauge (R.9, 1974). He stated that the problem was not the copper piping, but the way it was connected. Before the defendant purchased the vessel, the fitting was soldered on the *inside* underneath a nut such that it could not be detected and was not visible from the outside (R.9, 1966). This connection was not done during any time he served aboard the vessel [*i.e.*, it was not done during defendant's ownership of the vessel] (R.9, 1966).

After the casualty, Drakas personally installed a new gauge using copper tubing (R.9, 1965-66). The Coast Guard and Lloyds inspected the steering gear, including the connection, and Lloyds issued the vessel a classification certificate (R.9, 1966, 1969-70).

Lt. Cmdr. Scott Hartley, who investigated for the Coast Guard, testified that he reviewed the steering gear manual as part of his inspection (R.6, 1307). Hartley did not state, as plaintiff infers, that the steering gear manual "required" the use of stainless steel tubing. He merely testified, when asked by plaintiff's counsel, that copper tubing was not mentioned by the manual (R.6, 1312). Despite intense examination by plaintiff's counsel. Lt. Cmdr. Hartley testified that the U.S. Coast Guard found no negligence on the part of the SEABRAVERY in connection with this steering failure and casualty (R.6, 1330-31). Also, the U.S. Coast Guard approved reinstallation of the gauge on the SEABRAVERY using copper tubing (R.6, 1333).

2. Disassembly and Inspection of the Fitting

Plaintiff contends that the fact that the tubing leading to the pressure gauge was made of copper placed defendant on notice that it should have disassembled and inspected the fitting that failed. *See* appellant's brief, 9-15. Despite the opinion of plaintiff's expert, Ralston Cole, the overwhelming weight of the testimony supported the jury's conclusion that defendant breached no duty in not performing such disassembly. The testimony, discussed above, demonstrated that the use of copper complies with applicable standards and is not unusual. Thus, the jury

could have found, as they obviously did, that the mere use of copper tubing – an acceptable material – in and of itself gave rise to no extraordinary inspection duty. Furthermore, substantial testimony indicated that disassembly was unwarranted absent some sign of something wrong, and that there were no such signs before the casualty.

Chief Engineer Marinas testified that such disassembly of a connection is not required unless leakage or damage indicates that disassembly is required (R. 9, 1918-19). There had never been any damage to the lines or leakage, and the condition of the lines appeared very good (*id.*). He testified that the SEABRAVERY's steering system is inspected every four hours during a voyage, and more often when the vessel is maneuvering in rivers (*id.*). This inspection includes checking for any leaks along the lines (R.9, 1920).

Second Engineer Drakas likewise testified that the steering gear was inspected frequently – hourly by the duty officer (R.9, 1953-54). Drakas's inspection included the gauges and the lines connecting the gauges (R.9, 1952). During his time aboard the vessel, the steering hydraulic lines had never shown any signs of leakage, had never been damaged, and thus, were never taken apart or replaced (R.9, 1953-54).

Defendant's expert, Berend Haveman, testified that if a line or connection is not leaking, there is no way to tell whether it is about to fail (R.9, 1989-90). When lines are not leaking and there is no external defect, the normal practice does not require taking the lines apart (*id.*). Haveman testified that he examined the lines on the

SEABRAVERY after the collision, and that nothing externally indicated that the line would fail (R.9, 1988).

3. The Isolation Valve

The undisputed evidence was that the steering hydraulic system was equipped with an "isolation valve" to activate and deactivate the steering system pressure gauge. If that valve had been closed, no fluid would have flowed to the fitting that failed, and the casualty would not have occurred. Thus, plaintiff asserted at trial, and asserts again before this Court that defendant was negligent in leaving this valve open. He asserts that the steering gear manual required that the valve be closed, except when the crew was taking readings on the pressure gauge. *See* appellant's original brief, 15-19. Again, the jury was presented with substantial evidence demonstrating that defendant was not negligent in having the valve open. In fact, defendants may have been negligent had they closed the valve while navigating in confined waters, like the Mississippi River.

The manual itself states that the purposes for its recommendation is to protect the gauges, not to protect against a hydraulic leak or a steering failure as plaintiff argues:

> The oil pressure in a steering gear must, of necessity, fluctuate according to the operational requirements of the gear. These fluctuations may impair the accuracy in reading of a pressure gauge, so it is recommended that the isolating valves associated with the gauges should be kept closed, except when actual readings of the gauges are being taken.

(Trial Ex. P-36, Section 4.2; (reproduced at R.1, 228); R.9, 1945-46).

Additionally, the overwhelming testimony was that good seamanship practices *required* the isolation valve to be kept open while the vessel was maneuvering in confined waters, such as the Mississippi River.

Chief Engineer Marinas testified that the practice aboard the SEABRAVERY was to keep the gauge isolation valves closed while the vessel is at sea, but open while maneuvering in a river (R.9, 1927-28). The valve is kept open and the gauge is operational so that the crew can quickly observe the working of the equipment (*id.*). When questioned regarding the manual recommendation, Marinas testified that it only related to protecting the gauges, not to guarding against a steering failure (R.9, 1941, 1945-47).

Second Engineer Drakas likewise testified to the SEABRAVERY's practice regarding the isolation valve and the reason for keeping the valve open and the gauges operating in confined waters (R.9, 1956, 1972-73). He explained that when the vessel is maneuvering in a river, more pressure is on the lines [requiring that the pressure be frequently checked], and if the isolation valve were closed, a check of the system would require one to spend time to open the valve before the pressure could be checked (R.9, 1972-73). He disagreed with plaintiff's counsel's assertion that the better practice was to keep the valves closed in rivers (*id.*).

Finally, expert Haveman testified that the manual recommendation had nothing to do with preventing a steering failure, but only with protecting the accuracy of

the gauges (R.9, 1990-91). If the purpose of the recommendation was to protect against steering failures, the manual would have so stated (*id.*). Haveman testified the better practice was to keep the valve open while the vessel is maneuvering in confined waters, because frequent readings on the gauges are the earliest sign of a malfunction (R.9, 1991-92). He knew of no rule or regulation by the Coast Guard or any other organization that required the isolation valve to be closed (*id.*).

Again, Coast Guard Lt. Cmdr. Hartley and the Coast Guard found no negligence on the part of the SEABRAVERY leading to the collision, even though the valve was open. The endorsement of Hartley's supervisor on the Coast Guard report (Tr. Ex. D-21) confirmed that the purpose of closing the valve was not to prevent a steering failure but merely to protect the gauges.

4. The Alleged Inadequate Alarms

Plaintiff argued before the trial court, and again argues on appeal, that defendant was negligent, because the SEABRAVERY's steering system alarms were useless and in violation of applicable regulations. He contends that the vessel had a single hydraulic fluid reservoir rather than a dual reservoir system, and that the low fluid level alarm on the system was in violation of regulations that require a steering system to be placed back into service within forty-five seconds after the alarm sounds. He claims that the low pressure alarm was useless because Pilot Doyle "unequivocally" testified that no alarm sounded on the ship's bridge, and because this alarm did not sound until after the allision. He alleges

that Second Engineer did nothing after the low pressure alarm sounded, even though this alarm sounded almost a minute before the collision. *See* appellant's original brief, 19-21.

Despite plaintiff's allegations, the evidence and testimony indicated that the ship's alarms complied with applicable regulations, that the alarms did sound as required by the regulations, and that the ship's engineers responded to the alarms.

Contrary to plaintiff's assertion, the vessel was not in violation of any regulation for having a single hydraulic reservoir system rather than a dual reservoir system. Even plaintiff's expert admitted that the SEABRAVERY's single reservoir system met the applicable regulations (R.6, 1285). Expert Berend Haveman testified that the forty-five second switchover requirement (*i.e.*, part of the dual reservoir requirement referenced by plaintiff's counsel) applied only to vessels built after September 1984 (R.9, 1992-93). The SEABRAVERY was constructed in 1973 (R.9, 1992).

Additionally, the vessel's alarms were in accordance with international regulations. International regulations require the vessel to have a low hydraulic fluid alarm on the bridge and in the engine room; the SEABRAVERY had this alarm in both places (R.9, 1992). There was no requirement that the vessel have a low steering pressure alarm on the bridge (*id.*).

Furthermore, the evidence demonstrated that the alarms were functioning properly. Pilot Doyle indicated that he realized that the vessel lost her steering about one minute before impact (R.6, 1186-87). Second Engineer

Drakas testified that the low pressure alarm sounded about one minute before impact (R.9, 1961). Thus, clearly, the jury was justified in finding that the low pressure alarm worked as designed.

The low *level* alarm is not designated to immediately sound when the loss of steering *pressure* causes a steering failure. As the name implies, it is designed to sound when the fluid in the tank is low. Obviously, when a loss of *pressure* causes the steering loss, the low level alarm will not sound unless and until the pressure loss causes a sufficient fluid leakage to trigger the low level alarm (*see* R.9, 2003-04). Chief Engineer Marinas testified that the Lloyds inspector tested the low level alarm during his inspection just nineteen days before the collision and that it worked as designed (R.9, 1921-23). The oil was drained, and the alarm sounded when the tank was a little more than half full (*id.*). Afterwards, the Lloyds inspector issued a classification certificate (*id.*).

Likewise, the low level alarm worked in accordance with its designed function on the day of the collision. As expert Haveman testified, where steering is lost as the result of a loss of hydraulic pressure, as was the case here, although the *pressure* alarm will immediately sound (as it did here), the low *level* alarm is not going to sound immediately on a steering loss (R.9, 2003-04). Rather, the low level alarm will not sound until the pressure loss causes sufficient fluid to drain from the reservoir to trigger the alarm. Second Engineer Drakas testified that the low level alarm sounded in the engine room at about the time of impact (R.9, 1961-62). After the impact, he went to the bridge, where the low level alarm was still sounding (R.9, 1964).

Plaintiff relies on the testimony of Pilot Doyle, who he contends "unequivocally" testified that the low level alarm did not sound. However, Pilot Doyle did not "unequivocally testify," as plaintiff asserts. Rather, he testified that he was busy on the radio, blowing the danger signal on the ship's whistle and issuing commands, and could not positively recall whether or not an alarm had sounded on the bridge (R.6, 1194-95). Based on this evidence, the jury clearly was justified in finding that the ship's alarms complied with applicable regulations and were working properly.

Contrary to the plaintiff's assertions, the jury also was justified in finding that the vessel's crew responded when the low pressure alarm sounded. Second Engineer Drakas, who was busy operating the controls in the engine room, testified that immediately upon the low pressure alarm sounding, he dispatched the Third Engineer to the steering gear room (R.9, 1958-59). Seconds afterwards, he received the full astern engine order from the pilot on the bridge (*id.*). Pilot Doyle testified that at about this same time, the ship's captain on the bridge was in communication with the engine room and confirmed the loss of steering (R.6, 1198-99). Additionally, the engineer dispatched to the steering room took emergency action to stop the loss of fluid by bending the leaking hydraulic tube (R.9, 1963-64).

Thus, based on the lack of substantive evidence, the jury clearly could and did disbelieve plaintiff's allegations that the Second Engineer did nothing after hearing the alarm. Additionally since the low pressure alarm had already sounded warning the engine room of the steering loss, and as the pilot already knew of the loss of steering

from the rudder's failure to respond, the jury clearly could have concluded that the sounding of the low level alarm was an irrelevant "red-herring".

Finally, the irrelevance of the alarms to preventing this allision is demonstrated by the testimony of Pilot Doyle. Substantial time is required to change the momentum of a large, fully loaded vessel such as the SEABRAVERY. Thus, regardless whether or not the alarms worked, once the steering failed, the collision was unavoidable:

Q. Do ships of this magnitude respond instantaneously, or do they take some time to check their momentum?

A. You mean counter momentum?

Q. Yes.

A. Yes, it would lake a lot of time.

Q. Why is that?

A. Well, if you have all that weight going in one direction, if the rudder would have responded, it would take a long time for it to check out. It is just a lot of weight going in one direction.

Q. Would it be fair to say you don't stop a vessel of this size on a dime?

A. No.

Q. What did you tell the people on the VTS?

A. I don't know if I got in touch with them before the impact, but I was trying – I know what I was trying to tell them. I was trying to tell them it was a dangerous situation, and I was positive I was going to have a collision, something to that effect.

(R.6, 1185-86).

E. Action of the Trial Court

On October 4, 1987, after hearing all the testimony and viewing all the evidence, the jury returned a verdict for defendant (R.3, 587-90). The trial judge entered final judgment in accordance with the jury verdict on October 5, 1989 (R.3, 608).

Plaintiff subsequently filed a motion for judgment n.o.v. (R.3, 610-33), and defendant filed an opposition to this motion (R.3, 636-53). On January 16, 1990, the trial judge denied plaintiff's motion (R.3, 654). Plaintiff filed a motion and order for appeal, and the trial judge signed the appeal order on February 21, 1990 (R.4, 808).

ISSUES PRESENTED FOR REVIEW

1. Whether this Court should affirm the jury verdict and judgment of the trial court, because the verdict is supported by the evidence and is not manifestly erroneous.

2. Whether this Court should reject, as without merit, plaintiff's argument that the trial judge erred in instructing the jury, because (a) plaintiff failed to properly preserve the issue for appeal, and (b) the charges suggested by plaintiff had no application to this case, and (c) any error that may have occurred was harmless, considering the court's instruction to the jury as a whole.

3. Whether this Court should refuse plaintiff's invitation to reverse and render damages in his favor, particularly since the jury verdict in favor of defendant is not manifestly erroneous and is supported by the evidence.

4. Alternatively, in event that the jury verdict and trial judgment in favor of defendant is reversed, whether this

case should be remanded for a new trial, and if not, whether the damages sought by plaintiff are excessive and not supported by the evidence.

ARGUMENT

I. THE JURY VERDICT AND TRIAL COURT JUDGMENT ARE SUPPORTED BY THE RECORD AND ARE NOT "MANIFESTLY ERRONEOUS"

Plaintiff correctly states that review of the jury's verdict is governed by the "manifest error" rule. *Rosell v. Esco*, 549 So.2d 840, 844 (La. 1989). Under this rule, where there is a conflict in the testimony, the jury's evaluations of credibility and reasonable inferences of fact may not be set aside by the appellate court. *Id.* Where the jury's decision and findings are reasonable in light of the record reviewed in its entirety,

> the court of appeal may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong.

Id., 549 So.2d at 844. The function of the jury, not the court of appeal, is to hear the evidence and make determinations regarding the credibility of the witnesses, "for only the factfinder can be aware of the variations in the demeanor and tone of the voice that bear so heavily on the listener's understanding and belief in what is said." *Id.* Likewise, "[t]he rule that questions of credibility are for the trier of fact applies to the evaluation of expert testimony, unless the stated reasons of the expert are

patently unsound." *Lirette v. State Farm Insurance Co.*, 563 So.2d 850, 1990 LEXIS 1410 (La. 6/14/90).

The record in this case, summarized in the Statement of Facts, above, demonstrates that the jury's verdict for defendant-appellee is supported with regard to all four of plaintiff's allegations of negligence.

First, the Lloyds standard itself, as well as substantial testimony regarding this standard, indicated that the vessel was not negligent for not changing the copper tubing. Furthermore, the steering gear manual plainly did not "require," as plaintiff alleged, that stainless steel tubing be used. The jury was reasonable in finding that the copper tubing connecting the pressure gauge breached no standard of care. Additionally, as a fitting failed, and not the copper tubing itself, the jury clearly could have found that the use of the copper tubing was irrelevant, as it was not a causative factor in the collision.

Second, the jury properly found that defendant breached no duty regarding inspection of the connection that failed. The testimony demonstrated that the steering system was regularly inspected, and in fact, was inspected just before the vessel left her berth at Shell-Norco. More importantly, uncontradicted evidence proved that the steering system evidenced no external sign of any leakage or damage, and that absent such sign, a reasonable inspection did not dictate disassembling the steering system.

Third, testimony substantiated a jury finding that good seamanship required that the pressure gauge isolation valve be left open while the vessel navigated in confined waters, such as the Mississippi River. There is

no rule or regulation requiring the vessel to close the valve. Quick reading of the gauges is a necessity, and even the few seconds needed to open a closed valve could prove crucial.

Fourth, the evidence supported a jury finding that the ship's steering alarms were in accordance with international regulations, that they were functioning properly, and that the crew took the available precautionary measures when the steering alarm sounded. Furthermore, the evidence substantiated a jury finding that the workings of the alarms were irrelevant to the case. The sounding or non-sounding of the alarms, with the steering failure only a minute before collision and with the engine room and bridge already aware of the steering failure, had no bearing on the occurrence of this allision.

The mere existence of contrary evidence does not give rise to reversal. The jury, as the finder of fact in this case, was charged with making the credibility determinations, including such determinations with regard to the conflicting expert testimony. The jury resolved these conflicts, based on substantial evidence, in favor of defendant. Under *Esco* and *Lirette*, this Court is not free to reverse these credibility determinations.

Finally, plaintiff's citation of *Van Eyken v. Erie Railway Co.*, 117 F.712 (E.D.N.Y. 1902),[3] as a supposedly similar case, does not render the jury's verdict manifestly erroneous. In *Van Eyken*, a set screw on an old, mechanical steering gear system came loose, causing a steering system to fail. There, the trial judge, *sitting as the trier of fact*,

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[3] Appellant's original brief, 13-15.

found the vessel owner negligent for failure to inspect. However, merely because the *factfinder* in that case found that defendant negligent *as a matter of fact* did not require the jury, as the factfinder in this case to find Coronation negligent. This jury weighed the facts in this case and concluded, based on sound evidence, that defendant was not negligent. *Van Eyken* simply is irrelevant to this jury's factfinding and provides no basis for varying from the "manifest error" rule.

Nevertheless, *Van Eyken* is not "squarely on point," as plaintiff contends. Unlike the set screw which was not regularly inspected and which became loosened under the facts of that case, the evidence in this case is that the tubing and connections on the SEABRAVERY's steering gear were regularly inspected and were inspected shortly before this casualty. **Furthermore, plaintiff conveniently omits from his *Van Eyken* quotation the last five sentences of the quoted paragraph, which clearly distinguish that case. The *Van Eyken* court made clear that it based its fact finding of negligence regarding the loosened set screw on substantial physical evidence showing that the shaft to which the set screw had been connected regularly had come loose and had been readjusted on several occasions:**

> But the shaft bears palpable evidence that this set screw had not been disturbed since 1899, and that rust, with its unifying power, had not retained it in place. The dents are sufficiently far apart to show that the shaft had been shifted frequently in the sleeve, and that there had been readjustments of the parts. Why was it repeatedly set, unless the shaft as often had been loosened by accident or design? If loosened so

> frequently from use, surely inspection was necessary. If it was released, and reset purposely, then some inspection was customary.

Van Eyken, 117 F. at 715.

Understandably, plaintiff omitted these five sentences from his quotation. In contrast to the set screw in that case, the hydraulic connection in this case was regularly inspected and was not a moving part subject to wear or adjustment. Furthermore, unlike the *Van Eyken* set screw, there was no evidence of any history of problems with the hydraulic connection in this case. *Van Eyken* simply is a different case involving a different fact finder that reached rendered a judgment based on the peculiar facts of that case. It does not dictate, as plaintiff contends, that the jury verdict in this case be overturned.

Based on the entire evidence presented, the jury had more than sufficient basis to find that defendants were not negligent. The jury's verdict is not manifestly erroneous and should not be disturbed. In accordance with the commands of the Supreme Court in *Esco* and *Lirette*, this Court should affirm the jury verdict and trial court judgment in favor of Coronation.

II. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY REGARDING PRESUMPTIONS OF NEGLIGENCE

Plaintiff asserts that this Court should reverse the jury verdict and decide this case *de novo*, because the trial court refused to instruct the jury, in accordance with *James v. River Parishes Co.*, 686 F.2d 1129, 1132-33 (5th Cir. 1982), that an adrift vessel striking a stationary object is

presumed negligent. Plaintiff asserts that he preserved this error by objecting on the record. *See* appellant's original brief, 21-24.

Plaintiff's argument is without merit for three reasons: (A) plaintiff failed to preserve his objection and, in fact, explicitly waived his right to any such charge; (B) the charges proffered by plaintiff based on the *James* case and similar cases are inapplicable to the facts of this case; and, (3) the trial court, viewing the jury instruction as a whole, properly instructed the jury.

A. Plaintiff Failed to Preserve His Objection for Appeal in the Manner Required by Law, and, in Fact, Waived His Right to the Proffered Jury Instructions

1. Plaintiff failed to properly preserve his objection

La. Code Civ. P. art. 1793(C) provides in pertinent part that "[a] party may not assign as error the giving or the failure to give an instruction unless he objects thereto either before the jury retires or immediately after the jury retires, stating specifically the matter to which he objects ***and*** the grounds of his objection." This Court and other circuits have held that this article ***requires*** that the party not only inform the trial judge ***on the record*** of the matter to which he objects, but also regarding the specific grounds of his objection. *E.g., Bienvenu v. State Farm Mutual Auto Ins. Co.*, 545 So.2d 581, 587 (La. App. 5th Cir. 1989); *Bechtel v. Entringer Bakeries, Inc.*, 422 So.2d 1299, 1302 (La. App. 5th Cir. 1982); *Anderson v. Fowler Trucking, Inc.*, 506 So.2d 1319, 1324 (La. App. 2d Cir.), *writ denied*, 512 So.2d 434 (La. 1987). **A blanket objection that does**

not state the specific grounds for objection does not comply with the provisions of Articled 1973 and does not preserve the issue for appeal. *Brechtel,* 422 So.2d at 1302; *Anderson,* 506 So.2d at 1324. An objection made in chambers and off the record does not satisfy the requirements of Article 1793 and does not preserve the issue for appeal. *Smiciklas v. Groendyke Transport, Inc.,* 505 So.2d 775, 778 (La. App. 2d Cir.), *writ denied,* 506 So.2d 1231 (La. 1987).

On the record in this case, plaintiff's counsel made no more than an insufficient "blanket objection." He failed to state the grounds of his objection as required by Article 1793:

> BY THE COURT:
>
> Gentlemen, you have copies of the proposed charges and I have rearranged the sequence somewhat in order that I am going to give them, but you have a copy of what I propose to give. Mr. Morgan, before we begin I told Mr. Boudousque I would give him the opportunity to give his objections, so if you want to do that now.
>
> BY MR. MORGAN [Plaintiff's Counsel]:
>
> Yes, your Honor. The Plaintiff's objection to the Court's not giving Plaintiff's special charges 13, 14, 15, 16, 17, 18, 22, and in addition objection to the charge given on punitive damages.
>
> BY THE COURT:
>
> Objection is noted.

(R.10, 2221-22).

Plaintiff's objection did not state the specific grounds for objection as required by law. Accordingly, plaintiff's

jury instruction argument is not before this Court and provides no basis for reversing the jury's verdict.

2. Plaintiff waived his proffered charges

Furthermore, even assuming that off-the-record objections could be considered, plaintiff has no right to complain regarding the trial court's failure to give these charges, because he abandoned them in the trial court jury charge conference held off the record in chambers. During this conference, plaintiff's counsel, confident that the jury would return a verdict in plaintiff's favor, generally objected, but voluntarily withdrew his insistence that these charges be given. Plaintiff's counsel was confident that the evidence was in his favor, and that he did not need the charges to win the case. Now, after the jury has ruled against plaintiff, counsel insists that reversal is required by the court's failure to give these charges.

In *Anderson v. Fowler Trucking, Inc.*, 506 So.2d 1319 (La. App. 2d Cir.), *writ denied*, 512 So.2d 434 (La. 1987), the court rejected a plaintiff's attempt to appeal an objection, because in the trial court, counsel "never really objected to [the instruction], but merely expressed 'concern'. . . . " *Id.*, 506 So.2d at 1324. The appellate court found that "concern" was insufficient to preserve a jury charge objection.

While plaintiffs' counsel in this case went through the motion of "objecting" generally in this charge conference (as he also did on the record) before the jury retired, he shrugged off the failure to give the charges and failed to argue for their inclusion. Counsel exhibited no more than the "concern" discussed in *Anderson*. Thus, plaintiff

cannot now, in hindsight, be allowed to assert the absence of the instructions as a grounds for reversal.

B. The Trial Court Correctly Refused to Charge the Jury in Accordance with Plaintiff's Proffered Presumption Jury Charges Because the Law on Which They Are Based Is Not Applicable to This Case

Because plaintiff did not properly preserve the trial court's failure to give his proffered charges for appellate review, this Court need not consider the appropriateness of these charges. Nevertheless, a review of the case law upon which these proffered charges are based demonstrates that they have no application to the facts of this case.

Citing to *James v. River Parishes Co., Inc.*, 686 F.2d 1129, 1132-33 (5th Cir. 1982), plaintiff contends that the trial court erred in failing to instruct the jury that a drifting vessel that causes damage is presumed to be negligent. However, *James* is distinguishable and has no application to this case. There, James sustained injuries when the impact from a drifting barge to the vessel James was on threw James to the deck of his vessel. While James was unsure whether the drifting barge actually struck his vessel, there was no doubt that the drifting barge actually caused the impact that directly caused Jame's fall and resulting injury. *Id.*, 686 F.2d at 1331. The federal Fifth Circuit applied a presumption of negligence in favor of James, *i.e.*, in favor of a party *directly* injured as a result of the impact caused by the drifting vessel.

Likewise, in other tort cases applying the presumption, the party in whose favor the presumption was applied was the party *directly injured by an impact caused by the drifting vessel. See, e.g., The OREGON*, 158 U.S. 186, 15 S.Ct. 804, 39 L.Ed. 943 (1895) (presumption applied in a suit by the owner and crew of damaged, anchored vessel directly struck by a moving vessel); *The Baltimore Steam Packet Co. v. The Flushing, College Point and New York Steam Ferry Co.*, 70 U.S. (3 Wall.) 164, 18 L.Ed. 85 (1866) (presumption applied in a suit by an owner of a stationary, stranded vessel directly struck by a drifting vessel); *American Petrofina Pipeline Co. v. M/V SHOKO MARU*, 837 F.2d 1324 (5th Cir. 1988) (presumption applied in favor of dock owner whose dock was directly injured by a moving vessel); *Weyerhaeuser Co. v. Vessel ATROPOS ISLAND*, 777 F.2d 1344 (9th Cir. 1985) (presumption applied in favor of dock owner whose dock was directly damaged by vessels that broke away in stormy weather). Plaintiff has cited to no maritime case, the defendant's research has revealed no such case, where the presumption has been applied in favor of a party who was not *directly* injured or damaged as a result of the impact.

Plaintiff, Creppel, did not sustain his injury as the direct result of any impact between the SEABRAVERY and the barge, or even the group of barges upon which he was working. His injury did not result from being knocked down or thrown over by any impact caused by the SEABRAVERY, as were the injuries and damages caused in *James* and in other cases applying the presumption. The instant case does not fit within the class of cases to which the presumption applies, and the trial court correctly so recognized. Accordingly, even had plaintiff

properly preserved this issue for review by specifically objecting as required by law, the trial court correctly refused to give plaintiff's presumption charges.

C. The Instructions to the Jury, Considered in Their Entirety, Correctly Instructed the Jury on the Law Applicable to the Case and Provide No Basis for Reversing the Jury Verdict

Under Louisiana law, the adequacy of the instructions given to the jury is determined in light of the instructions as a whole; for reversal of a jury verdict to be in order, the charge must be so incorrect or inadequate to as to preclude the jury from reaching a verdict based on the law and the facts. *E.g., Anderson v. Fowler Trucking, Inc.*, 506 So.2d 1319, 1924-25 (La. App. 2d Cir.), *writ denied*, 512 So.2d 434 (La. 1987). The trial judge is not required to give the exact instructions requested by a party, but only to charge the jury as to the applicable law in such a fashion as to reduce the possibility of confusing the jury. *Cuccia v. Cabrejo*, 429 So.2d 232, 235 (La. App. 5th Cir.), *writ denied*, 434 So.2d 1097 (La. 1983). The appellate courts exercise great restraint before reversing the verdict of the jury on the suggestion that the jury instructions are erroneous. *Id.; Creel v. S.A. Tarver & Son Tractor Co., Inc.*, 537 So.2d 752, 754 (La. App. 1st Cir. 1988).

The trial court instructed the jury at length regarding the standard of care to applicable to defendant's conduct (R.10, 2231-32). It correctly instructed the jury concerning its duty to weigh the evidence, judging the credibility of the witnesses, and the burdens of proof that were applicable to the case (R. 10, 2228-30). The instructions given to the jury provided it with an adequate legal basis to

review the facts and to render a verdict. The trial court's instruction to the jury simply provide no basis for reversing the jury verdict in this case.

III. THIS COURT SHOULD AFFIRM THE JURY'S VERDICT; THERE IS NO FACTUAL OR LEGAL BASIS AUTHORIZING THIS COURT TO REVERSE AND RENDER A VERDICT IN FAVOR OF PLAINTIFF

Plaintiff submits that this Court should reverse the jury verdict, render judgment in his favor, and award him substantial damages for back and heel injuries, medical expenses, and loss of income. He also submits that this Court should award him punitive damages.

This Court need not address the issues, because plaintiff's assignments of error on liability lack merit. The evidence plainly supported the jury's verdict in favor of the defendant, and plaintiff's jury charge argument, even if it is properly before the Court, lacks merit. Furthermore, even where the jury is improperly instructed, "the appellate court may review the facts in the record and affirm the verdict if it is consistent with the evidence." *Broome v. Gauthier*, 443 So.2d 1127, 1134-35 n.3 (La. App. 4th Cir. 1983), *writ denied*, 445 So.2d 449 (La. 1984). Based on the overwhelming evidence substantiating the jury's verdict, even in the event of a jury instruction error, this Court should render a verdict in favor of defendant.

However, even viewing the liability evidence in a light overly favorable to plaintiff, the most that could be argued is that the evidence regarding negligence is conflicting. "[W]here the weight of the evidence is so nearly

equal that a first-hand view of the witnesses is essential to a fair resolution of the issues," the appellate court should remand for a new trial rather than render a verdict in the case. *See Ragas v. Argonaut Southwest Insurance Co.*, 388 So.2d 707, 708 (La. 1980); *Bridevaux v. Marchand*, 543 So.2d 930, 933 (La. App. 1st Cir. 1989). Thus, while the overwhelming weight of the evidence supports the jury verdict, and any judgment rendered by this Court should be one for defendant, at best for plaintiff, this case should be remanded for a new trial. This Court should not weigh the evidence against defendant based on a cold record, particularly where a jury, who saw the witnesses first-hand, has already assessed the evidence and found no negligence.

Nevertheless, even if this Court were to reverse and render, the injuries and losses for which plaintiff seeks recovery on appeal far exceed those justified by the evidence. Plaintiff asserts that he is entitled to recovery for pain and suffering resulting from an intra and extra articular fracture to his right os calcis (*i.e.*, a fractured heel), and for subtalar arthrodesis (fusion) surgery performed by Dr. John Watermeier on his right heel. He also claims he is entitled to pain and suffering for back injuries and for a hemi-laminectomy at L5-S1. He seeks $425,000 in pain and suffering damages and $29,315 in medical expenses. Additionally, plaintiff seeks $297,486 in loss of future wage damages, asserting that while he previously worked at a higher paying job, he now can only work at a minimum wage job. *See* appellant's original brief, 24-26.

There is no doubt that plaintiff sustained a heel injury. However, the medical evidence demonstrates that

except for plaintiff's own exacerbation of this heel condition, this injury would have healed itself in a short period of time. Regarding plaintiff's asserted back injury, the overwhelming medical evidence demonstrates that it did not result from this incident.

On the date of his accident, Dr. Scott Spann initially saw plaintiff in the Ochsner Foundation Hospital Emergency Room (R.9, 2050). Plaintiff made no complaints of back pain, and x-rays showed no back problem (R.9, 2050-52).

On the following day, plaintiff was seen by Dr. Gordon McFarland at Ochsner Foundation Hospital (R.9, 2057). Plaintiff had a heel fracture, but the fracture was not displaced (*id.*). He was discharged that day, October 21, 1987 (R.9, 2058). His hospital records indicated that he was given only two Vicodan tablets, indicating that he was not in serious pain (R.9, 2058-59). Plaintiff had no complaints of back or left leg pain that would indicate any type of back injury (R.9, 2058). Dr. McFarland next saw plaintiff a week later, on October 28, 1990; again, plaintiff had no complaints indicating any back injury (R.9, 2059-60). Dr. McFarland explained that a heel injury of the type sustained by plaintiff normally heals in six weeks and that he would expect that plaintiff should have been able to walk and return to a heavy manual labor job within about three months (R.9, 2060-61). He testified that early weight bearing on the injured heel is important to the recovery process (*id.*). He did not see any need for fusion surgery (R.9, 2063-65).

Dr. John Lockwood Ochsner, Jr. saw plaintiff at Ochsner on November 11, 1987, December 7, 1987,

December 28, 1987, and in January 1988 (R.9, 2010-23). On none of these occasions did plaintiff complain of back pain or any symptoms indicating any type of back injury (*id.*). Dr. Ochsner saw no need for surgery for plaintiff's foot injury (R.9, 2012). He recommended physical therapy – that plaintiff force himself to use his foot, despite the pain (R.9, 2013). Dr. Ochsner explained that a person with such an injury has to be encouraged to work through the pain by using the injured foot; otherwise the person will protect it and the foot will degenerate rather than get better (R.9, 2013, 2019-20, 2022). If the foot is not used, sympathetic dystrophy – a condition requiring pain management techniques – is more likely to develop (R.9, 2024-25). When Dr. Ochsner last saw plaintiff in January 1988, an appointment was scheduled for three weeks later; plaintiff, however, never returned (R.9, 2022-24). Dr. Ochsner stated that when he last saw plaintiff, he saw no need for fusion surgery (R.9, 2027, 2030).

Rather than continue the physical therapy recommended by the two Ochsner doctors, plaintiff then saw Dr. Watermeier, a doctor recommended by his counsel (R.6, 1359-60).

Dr. Watermeier saw plaintiff from January 22, 1988 through the time of trial, and during this time performed the foot fusion and back operation for which plaintiff claims damages. However, substantial medical testimony, including the testimony of Dr. Watermeier himself, questions the medical need for either of these operations, and further demonstrates that the claimed back injury and related surgery has no relationship to this incident.

On his first visit to Dr. Watermeier on January 22, 1988, plaintiff, with the help of the doctor's nurse, completed an extensive medical history questionnaire (R.7, 1453-59). On this questionnaire, plaintiff answered specific questions regarding the areas of his body suffering from pain (*id.*). He answered these questions indicating that he had no pain in his back or in his left leg or thigh (which would have indicated a possible back problem at L5-S1) (*id.*). On his next visit, plaintiff was asked to circle on a drawing of the human body the areas where he was experiencing pain; the only area circled was his right foot area (R.7, 1460-63). Rather than attempting to treat plaintiff's injury with physical therapy (which Dr. Watermeier simply dismissed as not having worked at Ochsner), Dr. Watermeier performed a fusion operated on plaintiff's foot on September 25, 1988 (R.7, 1499-1500).

Dr. Watermeier testified from his notes that he saw plaintiff regularly – on approximately nineteen occasions between plaintiff's first visit and March 1989 (R.7, 1450-1526). On none of these visits did plaintiff indicate that he had any left leg pain or other symptoms that would indicate a back injury at the L5-S1 level (*id.*). Additionally, during this time period, Dr. Watermeier ordered x-Rays, CAT scans and other diagnostic tests performed; none of these test indicated any back problem (*id.*). Suddenly, for the first time, *almost seventeen months after the accident*, plaintiff complained of left leg pain during his March 10, 1989 visit to Dr. Watermeier (R.7, 1526-28). Based solely on plaintiff's subjective complaints of pain on this occasion, and without performing any new objective tests to confirm a back problem, Dr. Watermeier diagnosed a disc herniation at L5-S1 and scheduled

plaintiff for back surgery (R.7, 1529-30). Incredibly, 18 days later, without performing any new tests confirming a herniated or ruptured disc, Dr. Watermeier performed this surgery on March 28, 1990 (R.7, 1530-31).

Substantial medical testimony questioned the wisdom of the surgical procedures performed by. Dr. Watermeier.

The two Ochsner physicians, as summarized above, saw no need for any type of operation; they believed that physical therapy, had plaintiff continued under their treatment, would have resulted in recovery of his foot and in plaintiff's return to work in approximately three months. Additionally, they observed no indication of any back injury resulting from his October 1987 accident.

Dr. Robert Steiner, the orthopedic surgeon who saw plaintiff at the request of the worker's compensation carrier – not the defendant – testified that he examined plaintiff on May 25, 1988, on January 26, 1988, and on September 19, 1989 (R.8, 1790-1836). On the first two visits, which pre-dated the back surgery, he saw no evidence indicating that plaintiff had any type of back injury at the L5-S1 level (R.8, 1792-98, 1812-15). He did not see any need for back surgery (*id.*). On September 19, 1989, almost five months after plaintiff's back surgery, plaintiff still was complaining of back pain (R.8, 1815-16).

Plaintiff's May 25, 1988 visit to Dr. Steiner was before plaintiff's foot surgery. Dr. Steiner testified that he would have treated plaintiff's foot pain with aggressive physical therapy and sympathetic block pain treatments (R.8, 1801-02, 1806-07). He explained that plaintiff had to use his foot to break the cycle of pain, and that surgery of the

type performed by Dr. Watermeier could actually aggravate the problem further (R.8, 1802-04). He saw no condition in plaintiff's foot that indicated surgery was needed (R.8, 1805-06). Plaintiff's visits to Dr. Steiner on January 26, 1988 and September 19, 1989 were after the foot fusion. During both visits, plaintiff continued to complain of pain in his right foot. (R.8, 1810-12, 1818-19). Dr. Steiner was not surprised that plaintiff's foot pain continued, as he did not believe there was sufficient evidence to perform the fusion operation (R.8, 1811-12).

Dr. Steiner testified that plaintiff's back complaints and back operation had nothing to do with his October 1987 accident. If plaintiff's disc injury had resulted from this 1987 accident, he would have expected an MRI scan conducted in June 1988 to have shown signs of the back injury (R.8, 1822-24). Furthermore, the discogram and CAT scan performed in February 1989 showed no sign of injury at L5-S1 (R.8, 1824). If a ruptured disc were found by Dr. Watermeier during surgery, it would have had to have occurred *after* these two tests were run in February 1989 (R.8, 1824-25). Furthermore, if a ruptured disk had resulted from the accident, he would have expected plaintiff to have had back pain within *weeks* of the injury and objective findings (confirmed by the above-discussed tests) within *weeks* of the incident (R.8, 1826-28). He saw no need for back surgery, performed so quickly after, and based solely on, a patient's initial, subjective complaint of back pain (R.8, 1828-29).

Additionally, the testimony of two doctors hired by plaintiff indicates that plaintiff's back injury did not result from plaintiff's October 1987 accident. Dr. April, a radiologist retained by plaintiff, testified that he saw

plaintiff on February 28, 1989 and reported that he observed no bulging or herniation at L5-S1 and that the area appeared normal (R.6, 1149-54). Dr. Jarrot, a neurosurgeon hired by plaintiff, saw plaintiff once – on November 18, 1987 (R.8, 1642). He saw no indication of any disc injury or nerve root impairment and saw no need for back surgery (R.8, 1655-69). He could not tell the jury that plaintiff suffered a disc injury as a result of the October 1987 accident (R.8, 1669-70).

Based on the medical testimony, even assuming that defendant is liable, plaintiff would be entitled to no recovery of medical expenses or pain and suffering for his back injury since it did not result from this accident. Regarding his foot injury, the evidence is that had plaintiff continued with his physical therapy, he would have been back at work at his same job approximately three months after his injury. Furthermore, the evidence indicates that his foot operation was unnecessary. Thus, at most, plaintiff would be entitled to pain and suffering for a three month foot injury and three months' lost wages. Plaintiff clearly is not entitled to the $425,000 in pain and suffering damages and the $29,315 in medical expenses he seeks in this case.

Finally, even assuming that defendants are liable, plaintiff's are not responsible for $297,486 in lost wages, as plaintiff asserts. The medical evidence plainly indicated that had plaintiff continued his physical therapy, he could have returned to his former job three months after his injury. Thus, assuming defendants could be liable, plaintiff is only entitled to three month's lost wages.

In any event, plaintiff's computation is based on the testimony of his economist expert, Dr. George Randolph Rice, who assumed that plaintiff could only work at minimum wage jobs after his injury. The testimony of Jennifer Palmer, defendant's vocational rehabilitation counselor, was that there were a substantial number of jobs that plaintiff could perform starting at four to five dollars per hour and increasing to ten dollars per hour within three years (R.9, 2079-85). Plaintiff clearly is not entitled to lost wages damages he seeks.

Thus, even assuming that defendants could be held liable, the damages to which plaintiff would be entitled are minimal. Louisiana law imposes a duty on a tort plaintiff to mitigate his damages. *See Philippe v. Browing Arms Co.*, 395 So.2d 310, 318 n. 12 (La. 1981); *Schroeder v. Di Pascal Cabinet Co., Inc.*, 467 So.2d 1380 (La. App. 5th Cir. 1985). The Supreme court noted in *Philippe* that

> The doctrine of avoidable consequences bars recovery of those damages which occur after the initial injury and which might have been averted by reasonable conduct on the part of the plaintiff. W. Prosser, *Law of Torts*, § 65 at 422 (4th ed. 1971). The Standard is that of a reasonable man under the circumstances.

Plaintiff clearly could have mitigated his economic, medical expense and pain and suffering damages by continuing his physical therapy. At most, assuming that defendant could be found liable, plaintiff is entitled to three month's lost wages and minimal pain and suffering damages; he is entitled to no medical expenses associated with the treatment and unnecessary operations performed by Dr. Watermeier.

Finally, plaintiff's claim for punitive damages is frivolous. Substantial evidence, summarized above, demonstrates that defendants were not negligent and clearly were not willfully and wantonly negligent as would be required to assess punitive damages.

CONCLUSION

Understandably, plaintiff has chosen to ignore and mischaracterize the evidence in this case, while making an emotional plea for reversal. Understandably, plaintiff is asking this Court to reweigh the evidence and render a finding in his favor. However, plaintiff has already had his day in court before a jury as the finder of fact. Substantial evidence supports the jury's fact finding that Coronation was not negligent, and there is no manifest error justifying a reweighing of the evidence. Plaintiff's jury instruction argument is not properly before this court, and even if it were, is without merit.

There is no basis for reversing the jury's verdict, and even if such basis existed, the substantive evidence would support this Court's entering judgment for defendant in accordance with the jury's verdict. Defendants

submit that this Court should affirm the jury's verdict in their favor.

Respectfully submitted,

/s/ Robert H Murphy
Kenneth J. Servay
Robert H. Murphy (#9850)
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CERTIFICATE OF SERVICE

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either by hand delivery or by placing same in the U.S. mail, first-class postage affixed thereto, on this 4th day of September, 1990, in accordance with the Rules of this Court.

/s/ Kenneth J. Servay

Supreme Court, U.S.
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No. 90-1773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CORONATION SHIPPING COMPANY

and

THE UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED,
Petitioners,

v.

GLENN J. CREPPEL, JR.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal, Fifth Circuit, State of Louisiana

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REPLY BRIEF OF PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT, STATE OF LOUISIANA

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PREFACE

Petitioners, Coronation Shipping Company and The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited,[1] advanced two main arguments in support of their petition. The Louisiana Court of Appeal violated the supremacy and uniformity of federal maritime law by (1) applying a standard of care at odds

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[1] Petitioners' Rule 29.1 statement is set forth at page ii of their petition. Petitioners have no parent companies or subsidiaries within the scope of the rule.

with the standard established as part of federal maritime law and (2) reviewing this case under a local, rather than a uniform maritime standard of review. In opposition, respondent has asserted: (a) that petitioners have "tunnel vision" and are "playing a game of semantics" in suggesting that the state appellate court applied an improper standard of care; (b) that the standard of review applied by the state appellate court is the same as the federal standard of review; and (c) that petitioners incorrectly contend that the Louisiana Supreme Court requires that state standards of review apply to federal maritime cases. None of respondents' arguments undermines the importance of the questions presented and the need to grant a writ in this case.

A. The State Appellate Court Impermissibly Substituted an Improper Strict Liability Standard of Care for the Established, Uniform Maritime *Negligence* Standard of Care

Respondent asserts that the state appellate court applied the established maritime standard of care in reversing the jury's verdict and that petitioners are "playing a game of semantics" in suggesting otherwise. Respondent's argument is refuted by the plain language of the decision below.

The trial court correctly applied the "reasonable care under the circumstances" standard adopted by this Court in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). Respondent does not and cannot challenge the applicability of this negligence standard, as he acquiesced in this standard before the trial court. Yet, the opinion of the state court of appeal makes no mention of *Kermarec*, nor does it attempt to apply any standard of care that in any way resembles the *Kermarec* standard. Rather, the new, *ex post facto* duty imposed on petitioners by the state court of appeal was an absolute duty to protect respondent from injury. As the court of appeal stated:

> Defendants [*i.e.*, petitioners] owed a duty to plaintiff [*i.e.*, respondent] to protect him against the injury caused by its failure to operate a safe vessel.

Petitioners' Petition for Writ of Certiorari, Appendix at 14a. Neither respondent nor the state court of appeal explains how this standard comports with *Kermarec*.

The decision of the Louisiana Court of Appeal speaks for itself. The standard of care applied by that court plainly deviates from the constitutionally supreme and uniform maritime standard announced by this Court in *Kermarec*. The state appellate court's decision ignores the supremacy of federal maritime law and destroys its uniformity—by authorizing the imposition of nonmaritime duties on a case-by-case basis. Petitioners submit that this important issue clearly merits the grant of a writ.

B. The Louisiana Court of Appeal Violated the Uniformity and Supremacy of Federal Maritime Law by Reviewing the Jury's Verdict Under Nonuniform, Louisiana Standards of Appellate Review

Respondent submits that the state appellate court committed no error in applying the Louisiana "manifest error" standard of appellate review, because this standard is the same as the federal "clearly erroneous" standard routinely applied in reviewing federal maritime cases. Respondent's suggestion is belied by the court of appeal's decision, as well as by Louisiana Supreme Court jurisprudence.

First, the opinion below plainly indicates the difference between Louisiana principles of appellate review and federal review standards customarily applied in maritime cases. In applying the Louisiana "manifest error" standard to reverse the jury's verdict, the court below reweighed *conflicting* evidence and refound the facts. Petitioner's Petition, Appendix, 1a-14a. Under maritime principles of appellate review, appellate courts are prohibited

from reweighing conflicting evidence and refinding the facts. *Eg., Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982); *McAllister v. United States*, 348 U.S. 19, 20, 22 (1954) and cases cited in Petitioners' Petition, 18-19.

Second, the Louisiana Supreme Court jurisprudence expressly acknowledges the difference between the "manifest error" standard and customary maritime standards of review. In *Arceneaux v. Domingue*, 365 So.2d 1330, 1333 (La. 1978), the Louisiana Supreme Court explained that a fact finding can be reversed as "manifestly erroneous" even though the evidence before the trier of fact provides a reasonable basis for its finding. Furthermore, that court recognized that the Louisiana Constitution of 1974, Article 5, Section 10(B) and (C) (*quoted* in Petitioner's Petition, 4-5), grants Louisiana appellate courts "full and complete jurisdiction to review the facts." *Arceneaux*, 365 So.2d at 1333. Uniform maritime principles of review prohibit the appellate court from disturbing a jury verdict or fact findings that have a reasonable basis in the record. *See McAllister v. United States*, 348 U.S. 19, 20 (1954) and discussion in Petitioners' Petition, 18-20.

The jury verdict in favor of petitioners was supported by substantial evidence and could not have been reversed under any federal standard of review. The Louisiana court's application of a nonuniform, nonmaritime standard of review impermissibly made the substantive rights of the parties depend on the courthouse where the action was filed. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10 (1953). The decision below undermines the constitutionally mandated uniformity and supremacy of federal maritime law and presents an important question that should be reviewed by this Court.

C. The Louisiana Court of Appeal's Failure to Apply Maritime Standards of Review Is in Accordance with Louisiana Supreme Court Jurisprudence

Respondent suggests that *Daigle v. Coastal Marine, Inc.*, 488 So.2d 679 (La. 1986), does not hold, as contended by petitioners (*see* Petitioner's Petition, 19-20 and footnotes 8 and 9), that Louisiana appellate courts must apply nonmaritime principles of review to maritime cases. Respondent asserts that *Daigle* is a nonmaritime case to which the Louisiana Supreme Court correctly applied a state standard of review.

Initially, respondent's argument is irrelevant. Regardless of whether *Daigle* was a maritime case and whether the Louisiana Supreme Court correctly or incorrectly applied a state review standard *in that case*, the court below improperly applied nonmaritime review principles *to this maritime case.*

In any event, respondent, and not petitioners, mischaracterizes *Daigle.* In that case, plaintiff, a passenger on a vessel moored in the Gulf of Mexico, was injured when he slipped *on the vessel's staircase* while disembarking the vessel. 488 So.2d at 680. As the *Daigle* plaintiff's injury was sustained on a vessel in navigation on the high seas, that tort action clearly was governed by maritime law. *See Kermarec, supra.* At the very least, *Daigle* strongly implies, if it does not outright hold, that Louisiana requires nonmaritime, Louisiana principles of review to be applied to non-Jones Act maritime cases decided in Louisiana state courts.

Consistent with the Louisiana Supreme Court's mandate in *Daigle*, the Louisiana Court of Appeal was required to incorrectly apply a nonmaritime standard of appellate review in this case, in violation of the constitutional supremacy and uniformity of federal maritime law. This Court should grant a writ to address this important issue.

CONCLUSION

This case implicates the supremacy and uniformity of maritime law. To the substantial prejudice of substantive maritime rights, Louisiana courts have refused to apply uniform maritime standards of care and principles of appellate review. The significance of the questions presented and the international concerns that they affect merit the granting of a writ of certiorari. Petitioners submit that this Court should grant a writ to fully consider both questions.

Respectfully submitted,

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